Supreme Court, U.S.
FILED

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No. ——

In The

Supreme Court of the United States

VANLINER INSURANCE COMPANY,

Petitioner,

v.

RICHARD BOONE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

PETITION FOR A WRIT OF CERTIORARI

RICHARD HODYL, JR.
Counsel of Record
MARK R. MISIOROWSKI
WILLIAMS MONTGOMERY & JOHN LTD.
Twenty North Wacker Drive
Suite 2100
Chicago, Illinois 60606
(312) 443-3200

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Where An Insured Tenders A Claim For Coverage To Its Insurer And Alleges Bad Faith Against Its Insurer, Does That Insurer Have A Right Under The Ninth Amendment To Assert A Privilege To Attorney-Client Communications Created Prior To The Issuance Of A Letter Denying Insurance Coverage To Its Insured?

2. Whether The Ohio Supreme Court's Ruling Denying An Insurer The Right To Assert A Testimonial Privilege Recognized Under Common Law Violates The Due Process Clause Of The Fifth And Fourteenth Amendments?

3. Where The Ohio Supreme Court Ruled That An Insurer Had No Privilege To Any Communications With Its Attorney Prior To The Denial Of Coverage, Does The Ohio Supreme Court's Ruling Impair The Retainer Agreement Between The Insurer And Its Attorney In Violation Of The Contracts Clause Of Article 1, Section 10 Of The Constitution Of The United States?

PARTIES TO THE PROCEEDING

Vanliner Insurance Company is the only petitioner in this proceeding. Petitioner certifies pursuant to Supreme Court Rule 29.6 that it has a parent company named UniGroup, Inc. which is privately held.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS AT ISSUE	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
I. The Ninth Amendment Includes The Right To Protect Confidential Communications With One's Attorney From Discovery	8
II. The Ohio Supreme Court's Modification Of The Attorney-Client Privilege Was Fundamentally Unfair And Violates Vanliner's Due Process	15
III. Vanliner's Rights In Its Retainer Agreement With Its Attorney Were Unilaterally Abrogated By The Ohio Supreme Court's Ruling	17
a. Any Legislative Enactment Or Judicial Decree That Substantially Changes The Rights Or Responsibilities Of Parties To A Contract Is Void	17
b. Government Alterations Of Private Contracts Are Permitted Only In Limited And Exceptional Circumstances, None Of Which Are Present Here	21
CONCLUSION	23

TABLE OF AUTHORITIES

Page

CASES

Aetna Cas. & Sur. Co. v. San Francisco Superior Court, 153 Cal.App. 3d 467 (1984) 13

Allied Structural Steel v. Spannaus, 438 U.S. 234 (1978) 20

Cantwell v. Connecticut, 310 U.S. 296 (1940) 9

Chicago B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897) 9

College v. Woodward, 17 U.S. 518 (1819) 19

Dion v. Nationwide Mut. Ins. Co., 185 F.R.D. 288 (D.Mont. 1998) 13

Dixie Mill Supply Co., Inc. v. Continental Cas. Co., 168 F.R.D. 554 (E.D.La. 1996) 13

Emile Indus., Inc. v. Patentex Inc., 478 F.2d 562 (2nd Cir. 1973) 11

Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co., 173 F.R.D. 7 (D. Mass. 1997) 13

Fletcher v. Peck, 10 U.S. 87 (1810) 19

Gideon v. Wainwright, 372 U.S. 335 (1963) 9

Griffin v. California, 380 U.S. 609 (1965) 9

Griswold v. Connecticut, 381 U.S. 479 (1965) 8, 9, 10

Hedge v. Evans Financial Corp., 707 F.2d 1566 (D.C.Cir. 1983) 20

Hickman v. Taylor, 329 U.S. 495 (1947) 16

Hurtado v. California, 110 U.S. 536 (1884) 15

TABLE OF AUTHORITIES – Continued

Page

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) 16

Lynch v. United States, 292 U.S. 571 (1934) 18

Malloy v. Hogan, 378 U.S. 1 (1964) 9

Maryland Am. Gen. Ins. Co. v. Blackmon, 639 S.W.2d 455 (Tex. 1982) 13

Mellon Bank, N.A. v. Aetna Business Credit, Inc., 619 F.2d 1001 (3rd Cir. 1980) 20

Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856) 16

NCK Organization Ltd. v. Bregman, 542 F.2d 128 (2nd Cir. 1976) 11

New Jersey v. Wilson, 11 U.S. 164 (1834) 19

Palmer v. Farmers Ins. Exch., 261 Mont. 91 (1993) 12

Perry v. United States, 294 U.S. 330 (1935) 19

Robinson v. California, 370 U.S. 660 (1962) 9

Superior Motors, Inc. v. Winnebago Indus., Inc., 359 F.Supp. 773 (D.S.C. 1973) 18, 19

Swidler & Berlin v. United States, 524 U.S. 399 (1998) 11, 12

Tackett v. State Farm Fire & Cas. Ins. Co., 653 A.2d 254 (Del. 1995) 13

Tidal Oil v. Flanagan, 263 U.S. 444 (1924) 18

Twining v. New Jersey, 211 U.S. 78 (1908) 16

Upjohn Co. v. United States, 449 U.S. 383 (1981) 11

Wolf v. Colorado, 338 U.S. 25 (1949) 9

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. Section 1257(a) 1

U.S. Const. amend. V 2, 5, 7, 15, 17, 18

U.S. Const. amend. IX 2, 5, 9, 10, 14

U.S. Const. amend. XIV 2, 5, 15, 17

U.S. Const., Art. I, Section 10 ..... 1, 5, 7, 18

OTHER AUTHORITIES

16A C.J.S. Constitutional Law, Section 353 *et seq.* 19, 21

Hamilton, The Federalist, No. 84 10

Madison, The Federalist, No. 37 9

Rice, Attorney-Client Privilege in the United States (2nd Ed. 1999) 18, Section 2:3 11

Tribe, Lawrence H., American Constitutional Law (1978) Section 10-7, 503 ..... 16, 17

Wigmore, J., Evidence, Section 2290 (McNaughton rev. 1961) 11

PETITION FOR A WRIT OF CERTIORARI

Petitioner Vanliner Insurance Company respectfully petitions this Court for a writ of certiorari to review a decision by the Supreme Court of Ohio.

OPINIONS BELOW

The Ohio Supreme Court denied Vanliner's petition for rehearing on May 23, 2001. (App. 36). The Ohio Supreme Court issued its ruling on April 4, 2001. (App. 1). The decision of the Ohio Court of Appeals, Tenth Appellate District, was entered on December 2, 1999. (App. 21). The trial court entered its decision compelling Vanliner to produce in discovery some portions of its claims file on November 9, 1998. (App. 28).

STATEMENT OF JURISDICTION

The Ohio Supreme Court issued its ruling on April 4, 2001. (App. 1). The Ohio Supreme Court denied Vanliner's petition for rehearing on May 23, 2001. (App. 36). This Court has jurisdiction pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

Article I, Section 10 of the Constitution provides, in relevant part: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . . " U.S. Const., Art. I, Section 10.

The Due Process Clause of the Fifth Amendment provides, in relevant part: "No person shall be . . . deprived of life, liberty or property, without due process of law. . . . " U.S. Const. amend. V.

The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.

The Due Process Clause of the Fourteenth Amendment provides, in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . . " U.S. Const. amend. XIV.

STATEMENT OF THE CASE

This case arises from a three vehicle accident that occurred on June 12, 1995 in Tampa, Florida. A driver insured under a Vanliner Insurance Company ("Vanliner") automobile liability insurance policy rear-ended an automobile in front of him on the roadway. Pursuant to its liability coverage, Vanliner defended its insured and, after determining that its insured was 66% at fault for the accident, paid the other driver the sum of $60,000 on behalf of its insured.

Vanliner also paid its insured $135,525.91 in workers' compensation benefits, representing both medical and lost wage reimbursement. Vanliner then filed a claim against a co-defendant in the accident. This co-defendant's insurance carrier ultimately paid its policy limit of $100,000 to settle the claims against the co-defendant.

Vanliner's insured then filed an underinsured motorists claim with Vanliner. Vanliner denied that claim on September 16, 1995, on the grounds that its policies did not extend underinsured coverage for the insured's vehicle, since Ohio is not a compulsory uninsured motorist state. At no time in this case did the parties dispute that Ohio law controls these insurance coverage disputes.

In the trial court, Vanliner's insured sought production of Vanliner's "claims file" as well as the file relating to the liability claims made against the insured by the co-defendant. Vanliner objected to the production of some of the documents requested on the basis that these particular documents were protected by the attorney-client privilege and work product privilege.

The trial court sustained some of Vanliner's objections to production and overruled others. (App. 28-33). However, the trial court's decision was also internally inconsistent in that while it protected some documents from disclosure, it nonetheless also ordered Vanliner to produce some of those same documents when they appeared elsewhere in the file. The trial court did not find that the insured had established "good cause" to overcome Vanliner's attorney-client or work product privileges. The trial court granted a stay of the lawsuit pending final resolution of the appeal on these discovery disputes. (App. 34).

In the Court of Appeals, Vanliner asserted that out of over 1,000 documents in the files, only portions of five (5)

documents which pre-dated the filing of the insured's lawsuit were protected from disclosure by the attorney-client privilege.[1] Vanliner also objected to the production of notes created after this lawsuit was filed and which related to Vanliner's strategy in handling the lawsuit. The Court of Appeals agreed that portions of 4 of the 5 pre-filing documents were protected by the attorney-client or work product privilege. (App. 21).

The Ohio Supreme Court held that in an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage. The Ohio Supreme Court found that attorney-client and work product documents that would contain information related to the bad faith claim created prior to Vanliner's denial of the insured's claim were "unworthy of protection." (App. 9). The Ohio Supreme Court's ruling was not based on the "crime-fraud" exception to the attorney-client privilege nor upon any other exception recognized under common law. Furthermore, Vanliner never waived its right to assert the attorney-client privilege in this lawsuit.

The Ohio Supreme Court denied Vanliner's petition for rehearing on May 23, 2001. (App. 36).

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[1] With one exception these 5 documents were found to be privileged by the trial court when duplicated elsewhere in the file.

REASONS FOR GRANTING THE WRIT

This case presents the Court with an ideal opportunity to affirm that the confidential relationship between a lawyer and his client is a bastion of an ordered liberty that is protected under the Constitution of the United States.

The Ohio Supreme Court has ruled that where an insured has merely alleged bad faith against its insurance carrier, all communications between the insurer and its attorney made prior to a declination of coverage are not privileged and are subject to discovery. The Ohio Supreme Court's ruling applies even where the crime fraud exception is not at issue and where the insurer did not waive its privilege.

The Ohio Supreme Court ignored the teachings and rulings of this Court, federal courts, and other state courts by redefining and narrowing the attorney-client privilege, and in doing so violated Vanliner's rights under Article I, Section 10 of the Constitution and under the Fifth, Ninth and Fourteenth Amendments. The Ohio Supreme Court's decision that communications between Vanliner and its counsel in this case are "unworthy" of privilege has no legal foundation in the Constitution, the common law or in this Court's prior rulings. Furthermore, the ruling by the Ohio Supreme Court now stands alone, in conflict with the rulings of other federal and state courts that have upheld the traditional scope of the privilege.

The Ohio Supreme Court's decision, if left intact, will inject uncertainty in the relationship between lawyers and their clients across the nation that did not previously

exist under any state or federal law, or under the common law. Inevitably, the Ohio Supreme Court's formulation of a new and restrictive test for identifying communications protected under the attorney-client privilege has serious implications beyond this case. For this reason alone, this Court should grant review in this case.

The United States Constitution also prohibits states, the federal government and the judiciary from creating any law that impairs the rights and obligations of private parties in contracts. This constitutional prohibition has been recognized and enforced by this Court, as well as numerous federal appellate and state courts across the nation.

In this case, Vanliner entered into a retainer agreement with its legal counsel to provide to it legal services evaluating the insured's claim. When Vanliner and its attorney entered into this agreement, both parties relied on the well-settled common law in existence at that time to govern their rights and duties in their relationship, that common law clearly provided that their communications would be protected from discovery. No exception to the privilege known at that time would have precluded enforcement of the privilege. The Ohio Supreme Court's ruling retroactively modified the law in place at the time of the making of the retainer agreement and, in effect, changed the retainer agreement itself. Vanliner asserts that the Ohio Supreme Court's ruling has materially altered and subverted Vanliner's retainer agreement with its attorney.

Courts and legislative bodies are prohibited from rewriting the material terms and conditions of existing

insurance contracts under Article I, Section 10 and the Fifth Amendment of the United States Constitution. Generally, any judicial or legislative act that attempts to make material alterations of the character, terms or legal effect of existing agreements is clearly void. In the instant case, Vanliner retained its attorneys in the underlying litigation to provide legal advice to it in the evaluation of the insured's claims. This agreement was made based on the well-founded assumption that the common law applicable to attorney-client communications would protect their communications from discovery. The Ohio Supreme Court's ruling was an impermissible modification of this agreement in violation of Article I, Section 10 of the Constitution.

The Ohio Supreme Court's ruling constitutes a prohibited expansion or modification of the material terms and conditions of the retainer agreement. In its relationship with its retained counsel, Vanliner was entitled to protect its communications with counsel from the eyes of third parties. The Constitution squarely prohibits such expansion of key contract provisions without the authorization and consent of the parties to that contract.

The prohibition barring a legislature or court from unilaterally re-writing private contracts is based on principle that the right of parties to structure contracts in accordance with their wishes and expectations is protected under our Constitution. If the freedom to contract under the Constitution is to retain any meaning it must impose limitations upon the power of legislatures and courts to abridge existing contractual relationships.

Government and judicial intermeddling with business essentially private in nature is repugnant to the fundamental concept of free enterprise. Such interference with private citizens' right to contract clearly violates the central freedoms afforded under the Constitution.

The Ohio Supreme Court's ruling must be vacated by this Court so that Vanliner's fundamental constitutional rights and contractual rights to protect communications with its counsel from discovery can be reinstated. Otherwise, a mixed message will be sent to courts across the country about how far a legislature, or a court for that matter, may go to re-write the rights and obligations of parties to a private attorney retainer agreement. Furthermore, individuals and corporations across the nation will be forced to enter into private contracts with their lawyers under a dark cloud of uncertainty whether their rights under their contracts will be changed without notice or warning, and without their consent, at some point in the future.

For these reasons and the reasons set forth below, Vanliner respectfully requests that this Court grant its petition for a writ of certiorari in this case.

I. The Ninth Amendment Includes The Right To Protect Confidential Communications With One's Attorney From Discovery.

This Court, in a series of decisions, has held that the Fourteenth Amendment absorbs and applies to the States those specifics of the first eight amendments that express fundamental rights. *See, e.g., Griswold v. Connecticut,* 381 U.S. 479 (1965) (Goldberg, J. concurring); *see also, Chicago*

B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Wolf v. Colorado*, 338 U.S. 25 (1949); *Robinson v. California*, 370 U.S. 660 (1962); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Griffin v. California*, 380 U.S. 609 (1965). The language and history of the Ninth Amendment reveals that the Framers of our nation's Constitution believed that there existed additional fundamental rights, protected from government infringement, which stand alongside those fundamental rights specifically enumerated in the first eight constitutional amendments. *See, Griswold v. Connecticut*, 381 U.S. 479 (1965) (Goldberg, J. concurring).

The Ninth Amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. Justice Goldberg, in his concurrence in the *Griswold* case, explained the Ninth Amendment's origin:

> The Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and the Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed fears that a bill of specifically enumerated rights[2] could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected. . . .[3]

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[2] Madison himself had previously pointed out the dangers of inaccuracy resulting from the fact that "no language is so copious as to supply words and

phrases for every complex idea." The Federalist, No. 37.

[3] Alexander Hamilton was opposed to a bill of rights on the ground that it was unnecessary because the Federal Government was a government of delegated powers and it was not granted the power to intrude upon fundamental personal rights. The Federalist, No. 84.

Griswold v. Connecticut, 381 U.S. 479, 489 (1965) (Goldberg, J. concurring).

This case presents the exact situation feared by the Framers of our Constitution. The Ohio Supreme Court unilaterally denied Vanliner its Ninth Amendment constitutional rights. The court's ruling ignored precedent of this Court and other courts, and ignored the protections afforded Vanliner under the Fifth, Ninth and Fourteenth Amendments. This error warrants this Court's review.

In *Griswold*, Justice Goldberg underscored the validity and importance of the fundamental freedoms protected by the Ninth Amendment:

> The Ninth Amendment may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold.

Griswold v. Connecticut, 381 U.S. 479, 492 (1965) (Goldberg, J. concurring).

Vanliner requests that this Court grant review so it has the opportunity to affirm that the Ninth Amendment includes the fundamental right to protect attorney-client communications from discovery in cases like this. The attorney-client privilege is the oldest of the privileges for

confidential communications known to the common law. 8 Wigmore, J., Evidence, Section 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998), *quoting Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). *See also, Emile Indus., Inc. v. Patentex Inc.*, 478 F.2d 562, 570-71 (2nd Cir. 1973).

It is generally accepted that the purpose of the attorney-client privilege is threefold: (1) to encourage free discussion by the client; (2) to relieve the attorney of the onus of determining on a good faith basis whether the communication is privileged, and (3) to deter the advertent or inadvertent use of privileged communications to the disadvantage of the client. *See NCK Organization Ltd. v. Bregman*, 542 F.2d 128, 135 (2nd Cir. 1976). The administration of justice is one of the central purposes of our Constitution.[4] Although the privilege may result in the suppression of evidence, its existence is justified by the perceived long-term social benefits of open and unfettered communications between lawyer and client. *See*, 1 Rice, Attorney-Client Privilege in the United States (2nd Ed. 1999) 18, Section 2:3.

Moreover, it is a fundamental principle of common law that the attorney-client privilege is triggered by the nature of the relationship between the client and the attorney, and not simply the "type of case" before the

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[4] The Preamble of the Constitution provides, in relevant part: "We the People of the United States, in Order to form a more perfect Union, establish Justice, . . . "

court. This Court's interpretation of the attorney-client privilege's scope has been guided by "the principles of the common law . . . as interpreted by the courts . . . in light of reason and experience." *Swidler & Berlin v. United States*, 524 U.S. 399 (1998). Reason and experience, as well as countless decisions by both state and federal courts, dictate that it is the nature of the relationship and expectations of the parties, not the cause of action, that controls whether communication between an attorney and the client can be discovered. *See generally, Palmer v. Farmers Ins. Exch.*, 261 Mont. 91, 108 (1993).

The Ohio Supreme Court's ruling in this case disregarded these fundamental principles of the common law. Justice Cook, who dissented from the Ohio Supreme Court's decision in this case, explained the fatal flaws in the Ohio Supreme Court's ruling:

> ***The majority cites no authority*** for the proposition that the attorney-client communications leading to a denial of insurance coverage are not protected from disclosure in a subsequent action alleging bad faith. . . .
>
> . . . .
>
> ***The "unworthy of protection" rationale espoused by the majority . . . is unsupported.*** . . .

(App. 13) (Emphasis added). Justice Cook pointedly warned of the dangers of the Ohio Supreme Court's ruling:

> The majority's holding is also startling for its practical effect. After today's decision, an insured need only *allege* the insurer's bad faith in the complaint in order to discover communications between the insurer and the insurer's attorney. Not even an allegation of the

> crime-fraud exception's applicability carries such an absolute entitlement to discovery of attorney-client communications. . . . This is a sweeping exception that a number of courts have refused to adopt.[5]
>
> . . . .
>
> But the majority overlooks the fact that an insurance company may consult with legal counsel to obtain legal advice about a coverage decision. [A]n insurance company's retention of legal counsel to interpret the policy, investigate the details surrounding the damage, and to determine whether the insurance company is bound for all or some of the damage, is a classic example of a client seeking legal advice from an attorney.

(App. 15-17).

In his dissent, Justice Cook exposed the majority's failure to follow the common law in its analysis of

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[5] *See, e.g., Dion v. Nationwide Mut. Ins. Co.*, 185 F.R.D. 288, 294 (D.Mont. 1998) (applying Montana law); *Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co.*, 173 F.R.D. 7, 11 (D. Mass. 1997) (applying Massachusetts law); *Dixie Mill Supply Co., Inc. v. Continental Cas. Co.*, 168 F.R.D. 554, 558 (E.D.La. 1996) (applying Louisiana law); *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 259-260 (Del. 1995) (declining to create a "per-se" waiver of privilege in bad faith cases); *Aetna Cas. & Sur. Co. v. San Francisco Superior Court*, 153 Cal.App. 3d 467, 476-477 (1984) (that insurer's "state of mind" is at issue in bad faith action does not justify an exception to the privilege). *See also, Maryland Am. Gen. Ins. Co. v. Blackmon*, 639 S.W.2d 455, 458 (Tex. 1982) ("if a plaintiff attempted to prove the validity of a claim against an insurer could obtain the insurer's investigative files by merely alleging the insurer acted in bad faith, all insurance claims would contain such an allegation").

whether Vanliner's communications with its attorney were protected from discovery. Vanliner asserts that if the Ohio Supreme Court followed the common law, a substantially different result would have been reached, and Vanliner's Ninth Amendment rights would have remained intact. However, such was not the case here and Vanliner now faces the abolition of its fundamental rights under the Ninth Amendment.

The Ninth Amendment reflects a belief of the Constitution's authors that there are other fundamental rights not expressly enumerated in the first eight amendments. The Ninth Amendment further reflects the intent that the list of rights included in the Constitution and Bill of Rights should not be deemed to be exhaustive. Vanliner asserts that its right to protect attorney-client communications falls squarely within those fundamental rights included and incorporated in the Ninth Amendment. The common law and the Constitution contain no authority to support the Ohio Supreme Court's unilateral narrowing of the attorney-client privilege. Vanliner asserts that the Ohio Supreme Court's ruling that Vanliner could not assert its fundamental rights in this case constitutes reversible error that must be reviewed and corrected by this Court. For these reasons, Vanliner respectfully requests that this Court grant its petition for a writ of certiorari.

II. The Ohio Supreme Court's Modification Of The Attorney-Client Privilege Was Fundamentally Unfair And Violates Vanliner's Due Process.

When the attorney-client privilege was narrowed in this case without prior notice to Vanliner, the Ohio Supreme Court violated Vanliner's due process under the Fifth and Fourteenth Amendments. Furthermore, when the Ohio Supreme Court's ruling gave Vanliner's opponents the unfair advantage of the opportunity to review confidential attorney-client communications, Vanliner's due process was violated. This Court should grant certiorari in this case to protect and preserve Vanliner's due process rights. This Court's intervention in this case would provide an institutional check and balance against an arbitrary and incorrect decision rendered by the Ohio Supreme Court in this case.

The procedural safeguards afforded by the Fifth and Fourteenth Amendments are based on the principle that personal freedom can be preserved only when there is some institutional check on arbitrary government action. Accordingly, Vanliner seeks this Court's assistance in this case to preserve its rights to protect confidential communications with its attorneys from discovery.

This Court has recognized the importance of due process in our society, and has even analogized due process to the Magna Carta's "guarantees against the oppressions and usurpations," *Hurtado v. California*, 110 U.S. 536, 531 (1884), by those in power, and this Court had further held that due process "is a restraint on the legislature as

well as on the executive and judicial powers of government" from changing the process which is due to citizens of this nation by its mere will. *See, Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856); *Twining v. New Jersey*, 211 U.S. 78, 106 (1908) (due process prohibits the enactment of any process that restricts or eliminates any "fundamental principle of liberty". This Court has held in *Hickman v. Taylor*, 329 U.S. 495 (1947), that "not even the most liberal of discovery theories can justify unwarranted inquiries" into privileged communications. The Ohio Supreme Court's decision in this case falls squarely at odds with *Hickman* and thus review here is warranted.

Justice Frankfurter captured part of this sense of procedural justice when he wrote that the:

> . . . validity and moral authority of a conclusion largely depend on the mode by which it was reached. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and the opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

Tribe, Lawrence H., American Constitutional Law (1978) Section 10-7 at 503, *citing, Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-172 (1951) (Frankfurter, J. concurring). Professor Tribe may have been the one to best state the essence of why this nation ensures due process to its citizenry:

> At stake here is not just much-acclaimed *appearance* of justice, but, from a perspective that treats

> process as intrinsically significant, the very *essence* of justice.

Tribe, Lawrence H., American Constitutional Law (1978) Section 10-7 at 503.

Vanliner was denied justice in this case, and that constitutional violation warrants review by this Court. In this case, Vanliner asserts that the ruling of the Ohio Supreme Court changed Vanliner's rights during the pendency of the appeal without notice and in violation of the Fifth and Fourteenth Amendments. If the Ohio Supreme Court ruling is left intact, Vanliner will be placed at a severe disadvantage in this litigation by being ordered to produce documents that contain confidential communications between it and its attorney. To enforce the Ohio Supreme Court's ruling would be akin to allowing a football coach to review his opponent's playbook before the game. Simply put, this is fundamentally unfair and is clearly prohibited under the Due Process Clause of the Constitution. This Court must intervene to prevent such an injustice from occurring.

III. Vanliner's Rights In Its Retainer Agreement With Its Attorney Were Unilaterally Abrogated By The Ohio Supreme Court's Ruling.

a. Any Legislative Enactment Or Judicial Decree That Substantially Changes The Rights Or Responsibilities Of Parties To A Contract Is Void.

This Court should grant Vanliner's petition for a writ of certiorari because the Ohio Supreme Court's ruling clearly abrogates Vanliner's rights under its private

retainer agreement with its attorney to protect its confidential communications. If the Ohio Supreme Court's decision is not overturned by this Court, then Vanliner will be barred from exercising its right to protect confidential communications with its attorney.

The effect of the ruling by the Ohio Supreme Court is inconsistent with the constitutional guarantees afforded to persons and corporations to enter into contracts freely and to be subject only to those terms and conditions that they contemplate and accept. The Ohio Supreme Court's narrow interpretation of the attorney-client privilege eliminates Vanliner's right to protect its communications with its attorneys. The Ohio Supreme Court has essentially rewritten the material terms and conditions of Vanliner's retention agreement with its counsel without either Vanliner's or the attorney's consent. This unilateral alteration of this contractual relationship violates the Constitution's guarantees of freedom to contract.

Article I, Section 10, of the United States Constitution provides that no state shall pass any bill or law that impairs the obligations of parties to contracts. U.S. Const. art. I. *See also, Tidal Oil v. Flanagan*, 263 U.S. 444 (1924). Although no explicit constitutional language protects the sanctity of contract against federal legislation, this Court has held that the Due Process Clause of the Fifth Amendment has essentially the same effect. *Lynch v. United States*, 292 U.S. 571 (1934) (invalidating Congressional attempts to cancel certain types of insurance policies). Both the federal and states' constitutions prohibit the enactment or enforcement of laws impairing the obligations of contracts. *Superior Motors, Inc. v. Winnebago*

Indus., Inc., 359 F.Supp. 773, 777 (D.S.C. 1973). For nearly two centuries, this Court has routinely declared invalid governmental acts that substantially impair or affect the contractual rights of parties. *See generally, Fletcher v. Peck*, 10 U.S. 87 (1810); *College v. Woodward*, 17 U.S. 518 (1819); *New Jersey v. Wilson*, 11 U.S. 164 (1834); *Perry v. United States*, 294 U.S. 330 (1935).

Generally, any legislative act that attempts to make material alterations to the character, terms or legal effect of existing contracts is clearly void. 16A C.J.S. Constitutional Law, Section 353 *et seq.* Within this prohibition are governmental acts that attempt to add a material condition or provision to a contract and those which attempt to release stipulations therein. *Id.* It may be said that a legislative enactment impairs the obligations of a contract when it attempts to take from a party a right that he is entitled to by its terms. *Superior Motors, Inc.*, 359 F.Supp. at 773. Thus, legislation that makes material alterations in the character, terms or legal effect of an existing contract impairs the obligations of that contract. *Id.* at 777. Furthermore, all legislative acts that impose added conditions or duties on parties to a contract are void if they produce a change in the obligations or substantial rights of the parties. *Id. See also*, 16A C.J.S. Constitutional Law, Section 353 *et seq.* Other material alterations that would impair the obligations of contracts are those that alter the extent of liability under a contract or which empower courts to re-write contractual agreements substantially. 16A C.J.S. Constitutional Law, Section 353 *et seq.*

A basic and cherished principle in this nation is that the right of parties to structure contracts in accordance

with their wishes and expectations is protected under our Constitution. *See generally, Hedge v. Evans Financial Corp.*, 707 F.2d 1566 (D.C.Cir. 1983). If the freedom to contract under the Constitution is to retain any meaning at all, it must be understood that it imposes limitations upon the power of legislatures, and courts for that matter, to abridge existing contractual relationships. *See generally, Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978). This constitutional guarantee is not limited to individuals. Commercial parties are also afforded constitutional protections to enter into contracts freely and to accept only those terms and conditions that they desire to undertake. *Mellon Bank, N.A. v. Aetna Business Credit, Inc.*, 619 F.2d 1001 (3rd Cir. 1980).

In the instant case, the Ohio Supreme Court has essentially rewritten the material terms and conditions of Vanliner's retention agreement with its counsel without either Vanliner's or the attorney's consent. This unilateral alteration of this contractual relationship violates the Constitution's guarantees of freedom to contract. The Constitution clearly prohibits such an expansion of key contract provisions without the authorization and consent of the parties to that contract.

Here, the effect of the ruling by the Ohio Supreme Court is inconsistent with the constitutional guarantees afforded to persons and corporations to enter into contracts freely and to be subject only to those terms and conditions that they contemplate and accept. The Ohio Supreme Court's narrow interpretation of the attorney-client privilege eliminates Vanliner's right to protect its communications with its attorneys. The Ohio Supreme Court has essentially rewritten the material terms and

conditions of Vanliner's retention agreement with its counsel without either Vanliner's or the attorney's consent. This unilateral alteration of this contractual relationship violates the Constitution's guarantees of freedom to contract.

Accordingly, this Court should grant Vanliner's petition for a writ of certiorari so that the freedom to contract freely will continue to be upheld as one of the central freedoms afforded to the citizenry of the United States.

b. Government Alterations Of Private Contracts Are Permitted Only In Limited And Exceptional Circumstances, None Of Which Are Present Here.

The petitioner acknowledges that the right to freely contract is not absolute. There are certain limited and exceptional circumstances where a legislature or court may alter private contracts and such alterations will withstand constitutional challenge.

The first exceptional circumstance where a private contract's terms and conditions may be altered is where the parties to the contract affected by the modification give their consent to such alteration. *See generally,* 16A C.J.S. Section 344. In the instant case, there are no facts that suggest that Vanliner or its counsel gave consent to modify their retainer agreement. Clearly, the "consent" exception is inapplicable here.

During periods of emergency, alterations are sometimes authorized and held not unconstitutional as an impairment of the contractual obligation. *See generally,* 16A C.J.S. Section 344. Again, the record contains no

evidence that any pressing emergency warranted any narrowing of Vanliner's rights under its retainer agreement with its attorneys. In the absence of any such exigent circumstances, the "emergency" exception clearly did not apply so as to constitutionally justify the Ohio Supreme Court's ruling in this case.

Private contracts may also be altered where the interests of the public welfare are at stake. Again, the record is completely devoid of any allegation that the Ohio Supreme Court's ruling was based on the interests of preserving and protecting the public interest and welfare. Accordingly the decision of the Ohio Supreme Court must be vacated by this Court and Vanliner's rights to protect its confidential attorney-client communications must be reinstated. Otherwise, if the Ohio Supreme Court's decision and narrrow reading of the attorney-client privilege is permitted to stand, a mixed message will be sent to courts across the country about how far a legislature, or a court for that matter, may go to re-write an otherwise unambiguous private contract. Furthermore, individuals and corporations across the nation will be forced to enter into private contracts with a significant degree of uncertainty as to whether their duties and obligations under their contracts will be changed without warning at some point by a legislature or court.

Accordingly, Vanliner respectfully requests that its petition for a writ of certiorari be granted by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD HODYL, JR.
Counsel of Record
MARK R. MISIOROWSKI
WILLIAMS MONTGOMERY & JOHN, LTD.
Twenty North Wacker Drive
Suite 2100
Chicago, Illinois 60606
(312) 443-3200

Attorneys for Petitioner

August 2001

SUPREME COURT OF OHIO

Boone, Appellant, v. Vanliner Insurance Company, Appellee.

[Cite as *Boone v. Vanliner Ins. Co.* (2001), 91 Ohio St.3d 209.]

Insurance – Action alleging bad faith denial of insurance coverage – Insured entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage.

(No. 00-104 – Submitted October 18, 2000 – Decided April 4, 2001.)

Appeal from the Court of Appeals for Franklin County, No. 98AP-1535.

Syllabus of the Court

In an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage.

Douglas, J. Appellant, Richard Boone, is an over-the-road truck driver and a resident of Ohio. Appellee, Vanliner Insurance Company ("Vanliner"), issued a commercial vehicle liability insurance policy to Boone, individually, and a separate policy to Boone's employer. Each policy of insurance provided $1,000,000 liability coverage. Boone's employer's policy also provided $1,000,000 uninsured/underinsured motorist coverage

and Boone's policy listed uninsured/underinsured motorist coverage in the amount of $50,000.

On June 12, 1995, Boone was in Tampa, Florida, transporting goods for his employer when he was involved in a three-vehicle accident. Boone, driving a tractor-trailer, was travelling behind a dump truck driven by Robert Allison, when Brett Verona, the operator of the third vehicle, lost control while attempting to change lanes. Due to Verona's negligence, Allison was unable to prevent his vehicle from colliding with Verona's. Boone's attempt to avoid hitting Allison's truck was also unsuccessful.

As a result of the accident, Boone suffered serious injuries, including bilateral fractures of both knees. Verona's insurer paid $100,000, the limit of Verona's liability coverage, toward Boone's damages. Boone, alleging that his damages exceeded $100,000, subsequently sought underinsured motorist benefits from Vanliner through his employer's policy of insurance. Vanliner denied Boone's claim, asserting that an exclusion provision in the policy precluded underinsured motorist coverage with regard to Boone's accident.

On June 12, 1997, Boone brought a declaratory judgment action against Vanliner seeking a determination that his policy and his employer's policy of insurance with Vanliner each provided him with $1,000,000 in uninsured/underinsured motorist coverage. With regard to his individual policy, Boone alleged that he was entitled to $1,000,000 uninsured/underinsured coverage by operation of law because Vanliner had failed to obtain a written waiver of uninsured/underinsured coverage in

an amount equal to his liability insurance as required by Ohio law. The complaint included a claim for bad faith,[1] alleging that Vanliner lacked reasonable justification for denying underinsured motorist coverage. To support his bad faith claim, Boone sought access, through discovery, to Vanliner's claims file.

In its answer to Boone's complaint, Vanliner denied that Boone was entitled to uninsured/underinsured motorist benefits under either policy. However, Vanliner subsequently changed its position and admitted that each policy of insurance provided Boone with $1,000,000 of uninsured/underinsured motorist coverage. Vanliner subsequently moved the court for a protective order with regard to numerous documents in its claims file. In its motion, Vanliner contended that several documents were protected from discovery by the attorney-client privilege and/or work-product doctrine.[2]

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[1] An insurer's lack of good faith in the processing of a claim is frequently referred to as "bad faith." Such conduct gives rise to a cause of action in tort against the insurer. *Hoskins v. Aetna Life Ins. Co.* (1983), 6 Ohio St.3d 272, 6 OBR 337, 452 N.E.2d 1315, paragraph one of the syllabus.

[2] The attorney-client privilege exempts from the discovery process certain communications between attorneys and their clients. The privilege has long been recognized by the courts, *Upjohn Co. v. United States* (1981), 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584, 591; *Moskovitz, infra,* 69 Ohio St.3d at 660, 635 N.E.2d at 349, and "[i]ts purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn* at 389, 101 S.Ct. at 682, 66 L.Ed.2d at 591.

Work product consists of "documents and tangible things prepared in anticipation of litigation or for trial by or for

The trial court ordered Vanliner to submit its claims file to the court for an *in camera* inspection to determine which documents, if any, were protected from discovery. The claims file consists of 1,741 documents numbered "0" through "1741."[3] The trial court found that one hundred seventy-five of the documents were protected from discovery and ordered Vanliner to release the unprotected documents to Boone.[4] In determining which documents were protected, the trial court applied our ruling in *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 635 N.E.2d 331, wherein we held that certain attorney-client communications and work-product materials in an

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another party or by or for that other party's representative" and may be discovered only upon a showing of good cause. Civ.R. 26(B)(3). This rule is often referred to as the "work-product doctrine." The purpose of the work-product doctrine is "to prevent an attorney from taking undue advantage of his adversary's industry or efforts." Civ.R. 26(A)(2).

Vanliner also argued that certain claims file documents were not discoverable because they were not relevant to the bad faith claim. The trial court did not accept this argument and Vanliner did not appeal that aspect of the trial court's ruling.

[3] The claims file documents are actually stamped "000000" through "001741." Throughout this opinion reference to specific documents will be by number without the preceding zeros.

We also note that there is no document numbered 929 in the claims file. According to Vanliner, this is due to a numbering error.

[4] The trial court held that the following documents were protected from discovery: 883, 884, 891, 893-895, 898, 910-928, 930, 932-984, 1015, 1033-1043, 1049, 1051-1077, 1085-1091, 1094-1098, 1101-1102, 1109-1114, 1124-1150, 1251, 1256, 1257, and 1258, and portions of documents numbered 858, 859, 861, and 862.

insurer's claims file were not protected from discovery by the attorney-client privilege or work-product doctrine.

Upon appeal[5] to the Tenth District Court of Appeals, Vanliner argued that the trial court erred in applying *Moskovitz* and that, as a result, the trial court incorrectly ordered Vanliner to disclose thirty documents that are protected by the attorney-client privilege and/or work-product doctrine. The court of appeals agreed with Vanliner's argument that *Moskovitz* was inapplicable. Consequently, the court found that of the thirty claims file documents challenged on appeal, Vanliner was required to disclose only one in its entirety. The court accepted Vanliner's argument that the remaining twenty-nine were privileged either in whole or in part. Accordingly, the court of appeals affirmed in part and reversed in part the order of the trial court and remanded the cause to the trial court.[6]

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[5] While the issue was apparently not raised by appellant either in the court of appeals or in this court, we note in passing, and without deciding, that there could be a question of whether this case, involving solely a discovery issue, met the requirements for a final appealable order as set forth in R.C. 2505.02(B)(4) and, in particular, (B)(4)(b).

[6] Upon the court of appeals' remand of this case to the trial court, the trial court issued a new order, which stated, "Pursuant to the Court of Appeals' Decision rendered December 2, 1999, the Court's November 10, 1998 Entry is hereby modified to indicate that [Vanliner] must produce only the following documents contained in the claims file: 597, 598, 600, and 601 with requested redactions, and 599."

This entry of the trial court is misleading because the order says that it modifies the trial court's order of November 10, 1998, so that only five documents from the insurer's claims file

This cause is now before this court pursuant to the allowance of a discretionary appeal.

The issue before us is whether, in an action alleging bad faith denial of insurance coverage, the insured is entitled to obtain, through discovery, claims file documents containing attorney-client communications and work product that may cast light on whether the denial was made in bad faith.

As already indicated, the trial court relied on our decision in *Moskovitz* to determine which claims file documents were protected from discovery. In *Moskovitz*, after receiving a substantial jury award for a medical malpractice claim, the plaintiffs sought prejudgment interest as authorized by R.C. 1343.03(C). *Id.*, 69 Ohio St.3d at 647-648, 635 N.E.2d at 340-341. To be successful in an R.C. 1343.03(C) proceeding, the prevailing party of the underlying case must prove, among other things, that the opposing party did not make a good faith effort to settle the case. With regard to this prong of R.C. 1343.03(C), *Moskovitz* sought to clarify the extent of a plaintiff's right to discovery of the malpractice insurer's claims file in light of the attorney-client privilege and the work-product doctrine. We stated that "[d]ocuments and other things showing the lack of a good faith effort to settle by

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must be produced. However, the trial court's November 10, 1998 entry ordered Vanliner to produce over fifteen hundred claims file documents. Vanliner appealed, and the court of appeals addressed, the trial court's November 10, 1998 order *only with respect to thirty documents*. Thus, the entry upon remand should have reflected that it modified the November 10, 1998 entry only as to those documents at issue in the appeal.

a party or the attorneys acting on his or her behalf are wholly unworthy of the protections afforded by any claimed privilege." *Id.* at 661, 635 N.E.2d at 349. Thus, we held that "[i]n an R.C. 1343.03(C) proceeding for prejudgment interest, neither the attorney-client privilege nor the so-called work product exception precludes discovery of the contents of an insurer's claims file. The only privileged matters contained in the file are those that go directly to the theory of defense of the underlying case in which the decision or verdict has been rendered." *Id.* at paragraph three of the syllabus.

Boone argues that claims file materials showing an insurer's lack of good faith in determining coverage are equally unworthy of protection. Thus, Boone argues that the trial court was correct in applying *Moskovitz* to the claims file documents in this case.

Vanliner, on the other hand, asks us to affirm the court of appeals' decision, which held that *Moskovitz* was not applicable in the present action. The court of appeals found the distinguishing factor between this case and *Moskovitz* to be the status of the underlying claim. Specifically, the court of appeals noted that in the case at bar the underlying claim (underinsured motorist damages) is still pending, whereas in *Moskovitz* the underlying claim (medical malpractice) had already been decided.

We find that the court of appeals, in this regard, misread our decision. Our ruling in *Moskovitz* did not turn on the status of the underlying claim, but rather upon our recognition that certain attorney-client communications and work-product materials were undeserving of protection, *i.e.*, materials "showing the lack of a good

faith effort to settle." *Moskovitz* at 661, 635 N.E.2d at 349. Moreover, this "distinction" could easily be eliminated by staying the bad faith claim until the underlying claim has been determined.

Vanliner argues that *Moskovitz* must be viewed in light of our subsequent holding in *State v. McDermott* (1995), 72 Ohio St.3d 570, 651 N.E.2d 985, so that even if our ruling in *Moskovitz* is applicable to attorney-client communications in the present case, *McDermott* requires that they be protected. We disagree.

In *McDermott*, we held that R.C. 2317.02(A) provides the exclusive means by which privileged attorney-client communications can be waived by the client. *Id.* at syllabus. The flaw in Vanliner's argument is that *McDermott* addresses client *waiver* of the privilege, whereas *Moskovitz* sets forth an *exception* to the privilege and is therefore unaffected by our holding in *McDermott*.

Vanliner further contends that if insureds alleging bad faith are able to access certain attorney-client communications within the claims file, then insurers will be discouraged from seeking legal advice as to whether a certain claim is covered under a policy of insurance. This argument is not well taken because it assumes that insurers will violate their duty to conduct a thorough investigation by failing, when necessary, to seek legal counsel regarding whether an insured's claim is covered under the policy of insurance, in order to avoid the insured later having access to such communications, through discovery.

Vanliner further argues that the release of the documents at issue in this case will undermine its ability to

defend on the underlying underinsured motorist claim that remains pending. We find this argument unpersuasive. If this were a legitimate concern, we believe that Vanliner would have moved the trial court to stay the bad faith claim, severing it from the underlying underinsured motorist claim. Our review of the record in this case reveals that Vanliner took no such action.

Like the trial court, we find that the rationale behind our holding in *Moskovitz* is applicable to actions alleging bad faith denial of coverage. That is, claims file materials that show an insurer's lack of good faith in denying coverage are unworthy of protection. It appears, however, that in determining which documents were protected in this case, the trial court applied the specific holding in *Moskovitz, i.e.,* only those documents containing attorney-client communications and work product that go directly to the theory of defense of the underlying claim are protected. We find this holding inapplicable in the present case because, while the lack of a good faith effort to settle involves conduct that may continue throughout the entire claims process, a lack of good faith in determining coverage involves conduct that occurs when assessment of coverage is being considered. Therefore, the only attorney-client and work-product documents that would contain information related to the bad faith claim, and, thus, be unworthy of protection, would have been created prior to the denial of coverage.

For the foregoing reasons, we hold that in an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of

coverage. At that stage of the claims handling, the claims file materials will not contain work product, *i.e.*, things prepared in anticipation of litigation, because at that point it has not yet been determined whether coverage exists. Of course, if the trial court finds that the release of this information will inhibit the insurer's ability to defend on the underlying claim, it may issue a stay of the bad faith claim and related production of discovery pending the outcome of the underlying claim.

We now turn to the specific documents at issue herein. Out of the 1,741 documents contained in the claims file, the issue before us concerns only twenty-nine documents, namely documents numbered 581, 582, 597, 598, 600, 601, 676, 677, 885, 886, 887, 888, 889, 890, 892, 896, 899, 900, 902, 903, 904, 905, 906, 907, 1106, 1107, 1151, 1152, and 1153. Although the trial court ordered Vanliner to produce over fifteen hundred claims file documents, Vanliner's appeal sought to protect only thirty of these documents and was successful as to twenty-nine.

The court of appeals found, and we agree, that the trial court's ruling was inconsistent with respect to eight claims file documents. Specifically, the trial court ordered Vanliner to produce documents numbered 597, 598, 600, and 601 *without* Vanliner's requested redactions but ordered Vanliner to produce documents numbered 858, 859, 861, and 862 *with* the requested redactions. This was inconsistent because the information ordered to be redacted from documents numbered 858, 859, 861, and 862 was identical to the information requested to be redacted from 597, 598, 600, and 601.

We do not agree, however, with the court of appeals' approach to resolving this inconsistency. The court found that "[d]ocuments 597, 598, 600 and 601 are simply duplicates of documents 858, 859, 861 and 862" and held that "[s]ince these documents are duplicates, the trial court erred in not ordering similar redactions of 597, 598, 600 and 601."[7] From this statement it would appear that the content of these documents was not independently evaluated and that it was assumed that because the trial court ordered the information to be redacted in some documents its mistake was in not ordering the same information redacted in others. We find this analysis flawed because it does not consider the possibility that the trial court's mistake was actually in permitting the redaction of the information.

Upon review of these documents in light of our foregoing holding, we find that two of them, namely, documents numbered 600 and 601, should be released *without* redactions to Boone. These documents were created prior to the denial of coverage and the information that Vanliner requested be redacted in these two documents, some of which reflects attorney-client communication, relates to the issue of insurance coverage. Therefore, documents

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[7] The court of appeals' statement that "[d]ocuments 597, 598, 600 and 601 are simply duplicates of documents 858, 859, 861 and 862" is not correct. While the information contained in the portions Vanliner requested to be redacted is the same in document number 597 as in 862, 598 as in 861, 600 as in 859, and 601 as in 858, the documents themselves are not duplicates of each other.

numbered 600 and 601 should be produced without redactions (which makes the redactions ordered in documents numbered 858 and 859 moot).

Documents numbered 597 and 598 contain the name of an attorney with the language "We can explore with atty Maddox" and "Check with atty Maddox." These documents were communications, it would appear, between two of Vanliner's claims employees. Vanliner's attorney was, apparently, not involved in these communications on the issue in question. Therefore, we find that documents numbered 597 and 598 do not contain attorney-client communications. Consequently, the information contained in these documents is not protected by the attorney-client privilege and should be disclosed without redactions (which makes the redactions ordered in documents numbered 861 and 862 moot).

As to the remaining documents at issue in this appeal, those documents contain attorney-client communications and/or work product that were created after coverage was denied. They are, therefore, protected from discovery.

Accordingly, for the foregoing reasons, we affirm in part and reverse in part the judgment of the court of appeals, and remand this cause.

Judgment affirmed in part,
reversed in part
and cause remanded.

RESNICK, F.E. SWEENEY and PFEIFER, JJ., concur.

MOYER, C.J., COOK and LUNDBERG STRATTON, JJ., dissent.

Cook, J., dissenting.

The majority today adopts a wholesale exception to the attorney-client privilege in actions alleging bad-faith denial of insurance coverage. The majority concludes that "claims file materials that show an insurer's lack of good faith in denying coverage are unworthy of protection." Because the majority's broad holding diminishes the attorney-client privilege without a reasoned basis for doing so, I dissent.

The majority cites no authority for the proposition that attorney-client communications leading to a denial of insurance coverage are not protected from disclosure in a subsequent action alleging bad faith. Instead, the majority relies on *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 635 N.E.2d 331, which allowed discovery of otherwise privileged materials in an R.C. 1343.03(C) proceeding seeking prejudgment interest. The *Moskovitz* court supported its decision by declaring documents showing lack of good-faith effort to settle "wholly unworthy" of any privilege. *Id.* at 661, 635 N.E.2d at 349.

The majority extends the *Moskovitz* rationale to this case, deciding that claims file materials showing an insurer's lack of good faith in denying coverage are similarly unworthy of protection by the attorney-client privilege. But the "unworthy of protection" rationale espoused by the majority was unsupported in *Moskovitz* and is unsupported now.

The attorney-client privilege "is intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests

in the observance of law and the administration of justice.' " *Swidler & Berlin v. United States* (1998), 524 U.S. 399, 403, 118 S.Ct. 2081, 2084, 141 L.Ed.2d 379, 384, quoting *Upjohn Co. v. United States* (1981), 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584, 591; see, also, *In re Klemann* (1936), 132 Ohio St. 187, 190-191, 7 O.O. 273, 275, 5 N.E.2d 492, 493-494. Although the privilege may suppress relevant evidence, its existence is justified by the perceived long-term social benefits of open communication between lawyer and client. See 1 Rice, Attorney-Client Privilege in the United States (2 Ed.1999) 18, Section 2:3. The law will not allow the privilege, however, when the attorney-client relationship is abused. *Id.* at 22-24, Section 8:2; see, also, *Clark v. United States* (1933), 289 U.S. 1, 15, 53 S.Ct. 465, 469, 77 L.Ed. 993, 1000. Accordingly, there is a well-established "crime-fraud exception," which denies the protection of the privilege when the client communicates with an attorney for the purpose of committing or continuing a crime or fraud. *State ex rel. Nix v. Cleveland* (1998), 83 Ohio St.3d 379, 383, 700 N.E.2d 12, 16. Communications in furtherance of a crime or fraud do not further the goals of the attorney-client privilege and are therefore undeserving of protection. See *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983* (C.A.2, 1984), 731 F.2d 1032, 1038.

With its "unworthy of protection" rationale, the majority effectively equates an insurer's communications with its attorney prior to a denial of coverage, in any case alleging bad faith, with communications in furtherance of a civil fraud. But bad faith by an insurer is conceptually different from fraud. Bad-faith denial of insurance coverage means merely that the insurer lacked a "reasonable

justification" for denying a claim. *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, 644 N.E.2d 397, paragraph one of the syllabus. In contrast, an actionable claim of fraud requires proof of a false statement made with intent to mislead. See *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St.3d 69, 23 OBR 200, 491 N.E.2d 1101, paragraph two of the syllabus. Proof of an insurer's bad faith in denying coverage does not require proof of any false or misleading statements; an insurer could, for example, act in bad faith by denying coverage without explanation. *Freedom Trust v. Chubb Group of Ins. Cos.* (C.D.Cal.1999), 38 F.Supp.2d 1170, 1173. Because bad faith is not inherently similar to fraud, there is no reason why an allegation of bad faith should result in an exception to the attorney-client privilege akin to the crime-fraud exception. *Id.*

The majority's holding is also startling for its practical effect. After today's decision, an insured need only *allege* the insurer's bad faith in the complaint in order to discover communications between the insurer and the insurer's attorney. Not even an allegation of the crime-fraud exception's applicability carries such an absolute entitlement to discovery of attorney-client communications. In order to overcome the attorney-client privilege based on the crime-fraud exception, a party must demonstrate "a factual basis for a showing of probable cause to believe that a crime or fraud has been committed and that the communications were in furtherance of the crime or fraud." *Nix*, 83 Ohio St.3d at 384, 700 N.E.2d at 16. The rule created today requires no similar prima facie showing of bad faith before an insured is entitled to discover attorney-client communications of the insurer. The result of the majority's decision is a categorical exception to the

attorney-client privilege applicable in *any* case alleging a bad-faith denial of insurance coverage. This is a sweeping exception that a number of courts have refused to adopt.[8] The majority has simply decided that insurance-bad-faith cases should be treated differently as far as the attorney-client privilege is concerned, ignoring that "[t]he nature of the relationship, not the nature of the cause of action, controls whether communications between attorney and client can be discovered." *Palmer v. Farmers Ins. Exch.* (1993), 261 Mont. 91, 108, 861 P.2d 895, 906.

Deeming the insurer's communications unworthy of the attorney-client privilege is also inconsistent with the very purpose of the privilege. As noted previously, the privilege is designed to encourage open discussion between attorney and client, so as to promote the observance of the law and allow an attorney to adequately

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[8] See, *e.g.*, *Dion v. Nationwide Mut. Ins. Co.* (D.Mont.1998), 185 F.R.D. 288, 294 (applying Montana law); *Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co.* (D.Mass.1997), 173 F.R.D. 7, 11 (applying Massachusetts law); *Dixie Mill Supply Co., Inc. v. Continental Cas. Co.* (E.D.La.1996), 168 F.R.D. 554, 558 (applying Louisiana law); *Tackett v. State Farm Fire & Cas. Ins. Co.* (Del.1995), 653 A.2d 254, 259-260 (declining to create a "per se waiver" of privilege in bad-faith cases); *Aetna Cas. & Sur. Co. v. San Francisco Superior Court* (1984), 153 Cal.App.3d 467, 476-477, 200 Cal.Rptr. 471, 477 (that insurer's "state of mind" is at issue in bad-faith action does not justify an exception to privilege); *Hartford Fin. Serv. Group, infra*, 717 N.E.2d at 1235-1236 (relying on *Aetna* to reject exception to privilege in bad-faith cases). See, also, *Maryland Am. Gen. Ins. Co. v. Blackmon* (Tex.1982), 639 S.W.2d 455, 458 ("if a plaintiff attempting to prove the validity of a claim against an insurer could obtain the insurer's investigative files merely by alleging the insurer acted in bad faith, all insurance claims would contain such allegations").

advise the client. With today's decision, the majority declares that an insurer's consultation with an attorney prior to a denial of coverage does not fall within this purpose. The rule laid down today assumes that an insurer will always have some sinister intent to act in bad faith when it discusses a coverage decision with its attorney. But the majority overlooks the fact that an insurance company may consult with legal counsel to obtain legal advice about a coverage decision. "[A]n insurance company's retention of legal counsel to interpret the policy, investigate the details surrounding the damage, and to determine whether the insurance company is bound for all or some of the damage, is a 'classic example of a client seeking legal advice from an attorney.' " *Hartford Fin. Serv. Group, Inc. v. Lake Cty. Park & Recreation Bd.* (Ind.App.1999), 717 N.E.2d 1232, 1236, quoting *Aetna Cas. & Sur. Co. v. San Francisco Superior Court* (1984), 153 Cal.App.3d 467, 476, 200 Cal.Rptr. 471, 476. These types of communications further the purpose of the attorney-client privilege and should be protected in the same manner as a communication by any other client seeking legal advice from an attorney.

An insurance company that seeks legal advice from an attorney about a coverage issue will now have to consider the possibility that those communications will be subject to future disclosure in the event that coverage is denied and the insured commences a bad-faith lawsuit. As one appellate court has observed, a rule such as the one announced today threatens the open and honest discourse between attorney and client that the privilege is supposed to protect:

"[A]n insurance company should be free to seek legal advice in cases where coverage is unclear without fearing that the communications necessary to obtain that advice will later become available to an insured who is dissatisfied with a decision to deny coverage. A contrary rule would have a chilling effect on an insurance company's decision to seek legal advice regarding close coverage questions, and would disserve the primary purpose of the attorney-client privilege – to facilitate the uninhibited flow of information between lawyer and client so as to lead to an accurate ascertainment and enforcement of rights." *Aetna*, 153 Cal.App.3d at 474, 200 Cal.Rptr. at 475; see, also, *State ex rel. United States Fid. & Guar. Co. v. Montana Second Judicial Dist. Court* (1989), 240 Mont. 5, 13, 783 P.2d 911, 916. The majority's decision here discounts these concerns based on its unsupported "unworthy of protection" rationale.

For these reasons, I cannot join the majority's unsound decision to declare a whole species of communications undeserving of protection by the attorney-client privilege. I would treat bad-faith cases no differently from any other case and regard attorney-client communications as privileged when those communications satisfy all elements of the privilege. This would not mean, of course, that an insurer would *never* have to disclose the substance of attorney-client communications in bad-faith cases. An exception to the attorney-client privilege already exists, for example, when an attorney jointly represents both the insured and the insurer. When an attorney has represented the common interests of insurer and insured, one joint client (the insurer) cannot assert the privilege in litigation against another joint client (the

insured). *Netzley v. Nationwide Mut. Ins. Co.* (1971), 34 Ohio App.2d 65, 77-78, 63 O.O.2d 127, 134-135, 296 N.E.2d 550, 561-562; *Palmer*, 261 Mont. at 108, 861 P.2d at 905.[9] Moreover, if an insured asserting a bad-faith claim makes a prima facie showing of *fraudulent* conduct, the crime-fraud exception may allow piercing the attorney-client privilege as to certain claims file materials. See *Barry v. USAA* (1999), 98 Wash.App. 199, 205, 989 P.2d

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[9] Bad-faith cases involving the joint-client exception often arise after an insured becomes liable for a judgment in excess of the insured's liability policy limits and later sues the insurer for failure to settle within the policy limits. See *Palmer*, 261 Mont. at 108, 861 P.2d at 905. During the course of the underlying litigation between the insured and the third party, the insurer has typically engaged an attorney to defend the insured. Thus, an attorney has represented two clients (insured and insurer) who theoretically shared a common interest, *i.e.*, defending a claim against a third party. This exception would not apply to a case alleging bad-faith denial of uninsured/underinsured motorist ("UM/UIM") coverage. In UM/UIM claims, the insured claimant and the insurer are in adversarial positions from the outset: while the insured's interest is in obtaining UM/UIM coverage, the insurer's interest is inevitably aligned with that of the alleged third-party tortfeasor. *Id.* at 108, 861 P.2d at 905-906. This adversarial relationship would render communications between the insurer and its attorney concerning a UM/UIM claim protected by the attorney-client privilege for purposes of the insured's bad-faith suit. *Id.*, 261 Mont. at 108, 861 P.2d at 906; *Barry v. USAA* (1999), 98 Wash.App. 199, 205, 989 P.2d 1172, 1176; see, also, 1 Rice, Attorney-Client Privilege in the United States (2 Ed.1999) 148, Section 4:29 ("If the interests of the insured and insurer become adverse, their joint communicant status ceases"); Developments in the Law – Privileged Communications (1985), 98 Harv.L.Rev. 1450, 1527 (noting that the attorney-client privilege "rests on assumptions of adverseness that underlie the American judicial system").

1172, 1176. Courts have also recognized that an insurer in a bad-faith case may impliedly waive the privilege altogether by raising an advice-of-counsel defense, thereby placing its attorney-client communications directly at issue. *Palmer,* 261 Mont. at 110, 861 P.2d at 907; *Transamerica Title Ins. Co. v. Santa Clara Cty. Superior Court* (1987), 188 Cal.App.3d 1047, 1053, 233 Cal.Rptr. 825, 829. Unlike the majority's rationale, these limitations on the attorney-client privilege are well supported and consistent with the policy behind the privilege.

I would affirm the judgment of the court of appeals and accordingly dissent.

MOYER, C.J., and LUNDBERG STRATTON, J., concur in the foregoing dissenting opinion.

Blue, Wilson & Blue and *Richard H.H. Troxell,* for appellant.

Frost & Maddox Co., L.P.A., and *Mark S. Maddox,* for appellee.

Robert P. Rutter, urging reversal for *amicus curiae,* the Ohio Academy of Trial Lawyers.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Richard Boone, Plaintiff-Appellee, v. Vanliner Insurance Company, Vanliner Group, Inc., and Unigroup, Inc., d/b/a Vanliner Insurance Group, Defendants-Appellants.	:	No. 98AP-1535 (REGULAR CALENDAR) (Filed Dec. 2, 1999)

DECISION

Rendered on December 2, 1999

Wolske & Blue, and *Richard H.H. Troxell*, for appellee.

Frost & Maddox Co., L.P.A., and *Mark S. Maddox*, for appellant Vanliner Insurance Company.

APPEAL from the Franklin County Court of Common Pleas.

BOWMAN, J.

On June 12, 1995, plaintiff-appellee, Richard Boone, was operating a tractor-trailer in Tampa, Florida. Another driver, Brett Verona, lost control of his vehicle and a third driver, Robert Allison, braked to avoid colliding with the Verona vehicle; unfortunately, Allison collided with the

Verone vehicle and Boone collided with the Allison vehicle. Boone has incurred medical bills and lost wages in excess of $100,000.

Verona was insured by State Farm Insurance Company, who offered to settle Boone's claim for the full policy limits of $100,000. Boone sought underinsurance coverage from defendant-appellant, Vanliner Insurance Company, which had issued policies to Boone personally, as well as to his employer. Vanliner denied coverage. Boone filed a declaratory judgment action seeking a judgment that he was entitled to uninsured/underinsured coverage and that Vanliner was obligated to pay him for the uninsured coverage. Boone also filed a claim alleging that Vanliner denied coverage in bad faith. To support his bad-faith claim, Boone sought Vanliner's claims file in discovery. Vanliner filed a motion for a protective order and objected to the disclosure of the documents based upon relevancy, attorney-client privilege and work-product privilege. The trial court conducted an *in camera* inspection of the claims file and sustained the objection as to some documents, overruled the objection as to other documents and ordered them to be produced with some of the documents containing redactions. Vanliner has appealed, pursuant to R.C. 2505.02(B)(4), and raises the following assignment of error:

> THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ORDERING DEFENDANT-APPELLANT TO PRODUCE TO PLAINTIFF-APPELLEE DOCUMENTS PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT PRIVILEGE.

In its brief, Vanliner claimed that the documents are not discoverable based only upon the attorney-client privilege and the work product doctrine, but, during oral argument, Vanliner also argued that the documents were irrelevant to the bad-faith claim.

" '[T]he burden of showing that testimony [or documents] sought to be excluded under the doctrine of privileged attorney-client communications rests upon the party seeking to exclude [them].' " *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, 166, quoting *Waldmann v. Waldmann* (1976), 48 Ohio St.2d 176, 178. In *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 660, certiorari denied, *Figgie v. Moskovitz* (1994), 513 U.S. 1059, the court stated that the attorney-client privilege is based on the premise that confidences shared in the attorney-client relationship are to remain confidential in order that a client may consult freely with an attorney. R.C. 2317.02(A) codifies this privilege as follows:

The following persons shall not testify in certain respects:

> (A) An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client and except that, if the client voluntarily testifies or is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject[.]

In the syllabus of *State v. McDermott* (1995), 72 Ohio St.3d 570, the Ohio Supreme Court held that "R.C. 2317.02(A) provides the exclusive means by which privileged communications directly between an attorney and a client can be waived."

Civ.R. 26(B)(3) provides that a party may obtain discovery of documents prepared in anticipation of litigation upon a showing of good cause. In *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, syllabus, the Ohio Supreme Court stated that "[a]n insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor." Thus, appellee argues, access to appellant's claims file is necessary to support his claim of bad faith.

The trial court relied upon *Peyko* and *Moskovitz* to determine that the documents were discoverable. In *Moskovitz*, the Supreme Court excluded from discovery for purposes of R.C. 1343.03, only those attorney client communications that go directly to the theory of the defense. *Peyko* and *Moskovitz*, however, both involved proceedings pursuant to R.C. 1343.03(C) for prejudgment interest, in which the attorney-client privilege and work-product doctrine no longer applied because the underlying case had been decided. Those cases are distinguishable because this case is still in progress. Thus, we must examine each document to determine whether it is privileged.

The documents have been numbered from 000000-001741 and are organized into three volumes. Vanliner contends that the trial court erred in ordering

the production of the following documents: 581, 582, 597-601, 676, 677, 885-890, 892, 896, 899-900, 902-907, 1106, 1107, 1151, 1152 and 1153. Documents 597-601 were generated before the lawsuit was filed on June 12, 1997, and Vanliner has agreed that these documents are discoverable; however, Vanliner has requested that parts of these documents should be redacted because they contain references to communications with Vanliner's counsel while the trial court found that the documents should be produced without redactions. Documents 597, 598, 600 and 601 are simply duplicates of documents 858, 859, 861 and 862. The trial court redacted the requested portions of 858, 859, 861 and 862, but not of 597, 598, 600 and 601. Since these documents are duplicates, the trial court erred in not ordering similar redactions of 597, 598, 600 and 601.

Document 599 is a duplicate of 860, but the trial court did not order a redaction in either document. The requested redaction in document 599 merely states facts already in evidence and is not privileged.

The remainder of the documents (581,[1] 582, 676, 677, 885-890, 892, 896, 899, 900, 902-907, 1106, 1107, 1151-1153) were generated after the lawsuit was filed, and consist of handwritten notes or memos relating to Boone's lawsuit and are protected under the attorney-client privilege or the work-product doctrine.

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[1] Document 581 does not contain a date but counsel asserted in oral argument that it was generated after the lawsuit was filed. Regardless, it contains handwritten notes concerning the receipt of the lawsuit and issues involved in the lawsuit and it is privileged.

As such, Vanliner must produce the following documents: 597, 598, 600 and 601 with requested redactions, and 599. The remainder of the documents are privileged and need not be produced. Vanliner's assignment of error is well-taken in part.

For the foregoing reasons, Vanliner's assignment of error is sustained in part and overruled in part, and the judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part, and this cause is remanded to that court for further proceedings consistent with this decision.

Judgment affirmed in part, reversed in part and cause remanded.

KENNEDY and BRYANT, JJ., concur.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Richard Boone, Plaintiff-Appellee, v. Vanliner Insurance Company, Vanliner Group, Inc., and Unigroup, Inc., d/b/a Vanliner Insurance Group, Defendants-Appellants.	:	No. 98AP-1535 (REGULAR CALENDAR) (Filed Dec. 2, 1999)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on December 2, 1999, Vanliner's assignment of error is sustained in part and overruled in part. It is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part, and this cause is remanded to that court for further proceedings in accordance with law consistent with said decision. Costs are to be assessed equally among the parties.

BOWMAN, KENNEDY and BRYANT, JJ.

By /s/ Donna Bowman
Judge Donna Bowman

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

RICHARD BOONE, Plaintiff,	:	Case No. 07CVC-06-6120
vs.	:	Judge Pfeiffer
VANLINER INSURANCE COMPANY, et al., Defendants.	:	

DECISION AND ENTRY

(Filed Nov. 10, 1998)

Rendered this 9th day of November, 1998

PFEIFFER, J.

This matter is before the Court on Defendant's Motions for Protective Order filed September 1 and 30, 1998 and Plaintiff's motion for leave to serve in excess of forty (40) interrogatories. The Court has conducted an *in camera* inspection of Defendant's claim file and reviewed the specific arguments relative to the motions for protective order.

Initially, the Court finds Plaintiff's request to serve in excess of forty (40) interrogatories well-taken and GRANTED.

Plaintiff initiated this declaratory judgment action against Defendant seeking declarations that: Plaintiff is an "insured" under a policy issued by Defendant, the policy provides uninsured/underinsured motorists coverage up to $1,000,000.00; and Plaintiff has a valid claim

to the coverage. Plaintiff also asserts a claim for Bad Faith based upon Defendant Vanliner's denial of coverage.

A summary of the events which have occurred in this action is beneficial to the determination of which documents are discoverable. On June 12, 1995, Plaintiff was operating a tractor trailer in Tampa, Florida. On that same date another driver, Brett Verona, lost control of his vehicle which entered a spin. Another driver, Robert Allison, then braked to avoid collision with the Verona vehicle. Plaintiff was traveling behind the Allison vehicle and collided with it. Plaintiff suffered bodily injuries including fractures to both knees.

Verona was insured by State Farm which offered to settle Plaintiff's claim for full policy limits of $100,000.00. Plaintiff has incurred medical bills and lost wages in excess of $100,000.00.

Plaintiff sought underinsurance coverage from Defendant Vanliner. Defendant denied coverage by letter dated September 19, 1996. Plaintiff filed this action on June 12, 1997. Additionally, a law suit involving the three parties was brought in Florida court where it was resolved.

Plaintiff seeks to discover Defendant's claims file. Plaintiff contends that the claims file will contain information relevant to the Bad Faith claim. To prevail on a claim of Bad Faith, Plaintiff must show that Defendant's refusal to provide underinsured motorist coverage was not predicated on circumstances that furnish reasonable justification therefore. *Zoppo v. Homesteed Insurance Co.* (1994), 71 Ohio St.3d 552 paragraph one of syllabus. Thus, the facts or information available to and upon which

Defendant relied in denying coverage are relevant to a claim for bad faith. The claims file is undoubtedly one of the best sources of such information.

Defendant has objected to the disclosure of numerous documents. The objections can be categorized as follows: 1) relevancy, in that the documents were prepared after the denial and/or documents were prepared for the Florida litigation; 2) work product privilege; and 3) attorney-client privilege.

The Supreme Court of *Ohio* has determined that where a party seeks prejudgment interest, an insurer's claim file may be sought through the discovery process. *Peyko v. Frederick* (1986), 25 Ohio St.3d 164. Portions of the file which are not shown to be privileged attorney-client communications are discoverable. *Id.* In reaching this conclusion the Court recognized that evidence of the insurers' conduct would be reflected in its claims file.

In *Moskovitz v. Mt. Sinai Medical Center* (1994), 69 Ohio St.3d 638, also a case involving a prejudgment interest issue, the Court stated:

> The time has come for this court to define what is and is not a privileged communication in an insurer's claims file for purposes of discovery in an R.C. 1343.03(C) proceeding for prejudgment interest. In our judgment, only those attorney-client communications contained in an insurer's claims file that go directly to the theory of defense are to be excluded from discovery. To hold otherwise would be to undermine the entire purpose of a hearing on the issue of prejudgment interest, i.e., to ascertain the truth regarding good faith efforts to settle. Civ. R.

> 26(B)(3) provides, in part, that "a party may obtain discovery of documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of good cause therefor." In a prejudgment interest proceeding, the good-cause requirement of Civ. R. 26(B)(3) is that which is appropriate to effectuate the General Assembly's purposes of enacting R.C. 1343.03(C) – to encourage and bring about settlements.

Id. at 662, footnotes omitted. The court held that "neither the attorney-client privilege nor the so called work product exception precludes discovery of an insurer's claims file. The only privileged matters contained in the file are those that go directly to the theory of defense of the underlying case . . . ". *Id.*

This Court believes that the rationale of *Moskovitz* and *Peyko* are equally applicable to a claim of bad faith as the issue is one of ascertaining the truth regarding the good faith of the insurer in reaching its decision to deny coverage. Thus, the documents produced for *in camera* inspection have been reviewed based on those decisions.

Defendant has agreed that documents numbered 277, 317-319, 321-323, 336, 597-613 and 624-629 are discoverable. Accordingly, the Court orders these documents to be produced. Counsel contends documents 597-601 contain references to communications with Vanliner's counsel and that such portions should be redacted. The Court has reviewed the portions and finds the documents should be produced without redactions.

Defendants' objections based on relevancy, i.e., the documents were prepared after the denial of coverage or pertain to Florida litigation are found not well-taken and overruled.

Volume I is identified as documents pertaining to the Florida litigation. No objection is raised to any of these documents based on attorney-client privilege or work product. Accordingly, the Court orders that Volume I be produced to Plaintiff's counsel in its entirety.

Volume II contains documents numbered 669-1741. The attorney-client privilege and work product doctrine is asserted as to documents numbered: 676, 677, 858, 859, 861, 862, 878-907. The Court has reviewed these items and finds the objection not well-taken and overruled as to: 676, 677, 860, 885-890, 892, 896, 897, 899, 900, 902-907. Documents 858, 859, 861, 862 will be produced with the highlighted portions redacted. The objection is SUSTAINED as to 883, 884, 891, 893-895 and 898.

Documents 910-928 and 930, 932-992 are also sought to be protected from discovery based on attorney-client privilege. The Court sustains the objection as to 910-928, 930, 932-984. The motion is overruled as to 985-989 and such documents shall be produced.

1015-1102 also have the attorney-client privilege asserted. The motion is sustained as to 1015, 1033-1043, 1049, 1051-1077, 1085-1091, 1094-1098 and 1101-1102. Accordingly, documents 1016-1032, 1044-1048, 1050, 1078-1084, 1092-1093, 1099-1100 shall be produced.

Documents 1103-1150 are asserted to contain attorney-client privilege. The objection is sustained as to

1109-1114, 1124-1150. Documents 1106-1108 and 1115-1123 shall be produced.

Production of Documents 1151-1153 and 1251 is objected to based on work product doctrine. The objection is overruled as to 1151-1153 and the documents shall be produced. The objection is sustained as to 1251.

Volume III contains documents 1255-1636. Attorney-client privilege and work product doctrine are asserted. The objection is sustained as to 1256-1258 only.

Based on the Court's decision Defendant shall produce the documents on or before November 17, 1998.

/s/ Beverly Y. Pfeiffer
BEVERLY Y. PFEIFFER,
JUDGE

Copies to:

Richard H. H. Troxell
Counsel for Plaintiff

Mark S. Maddox
Counsel for Defendants

**IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO
CIVIL DIVISION**

RICHARD BOONE,

Plaintiff,

-vs-

**VANLINER INSURANCE COMPANY,
et al.,**

Defendants.

Case No. 97CVC06-6120

JUDGE PFEIFFER

ENTRY AND ORDER VACATING TRIAL DATE DURING PENDENCY OF APPEAL

Upon Plaintiff's motion, supported by Defendant, and for good cause shown, the trial date in this action is hereby VACATED during the pendency of Defendant's appeal, to the Franklin County Court of Appeals, from the November 9, 1998, Decision and Entry of this Court compelling Defendant to produce in discovery certain portions of its claims file. Upon completion of the appeal a new trial date will be assigned.

JUDGE BEVERLY PFEIFFER

Copies to:

Mark S. Maddox, Esq.
Frost & Maddox Co., L.P.A.
500 South Fifth Street, Suite 301
Columbus, Ohio 43215-5430

Richard H. H. Troxell, Esq.
Wolske & Blue
580 South High Street, Suite 300
Columbus, Ohio 43215

THE SUPREME COURT OF OHIO

Richard Boone, Appellant, v. Vanliner Insurance Company, Vanliner Group, Inc., and Unigroup, Inc., d.b.a. Vanliner Insurance Group, Appellees.	:	Case No. 00-104 RECONSIDERATION ENTRY (Filed May 23, 2001) (Franklin County)

This cause came on for further consideration upon the amici curiae motions for leave to file under S. Ct. Prac. R. XI by the American Insurance Association, The Ohio Association of Civil Trial Attorneys, and the Ohio Insurance Institute, and appellees' motion for reconsideration. Upon consideration thereof,

IT IS ORDERED by the Court that the motions be, and hereby are, denied.

(Court of Appeals No. 98AP1535)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

MOTION FILED
SEP 17 2001

(2)

No. 01-303

In the
Supreme Court of the United States

VANLINER INSURANCE COMPANY,
PETITIONER,

v.

RICHARD BOONE,
RESPONDENT.

On Petition for Writ of Certiorari to the Ohio Supreme Court

MOTION FOR LEAVE TO FILE BRIEF FOR *AMICUS CURIAE* AND BRIEF FOR *AMICUS CURIAE* DEFENSE RESEARCH INSTITUTE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

MICHAEL F. AYLWARD*
RICHARD W. JENSEN
MORRISON, MAHONEY & MILLER, LLP
250 Summer Street
Boston, Massachusetts 02210
(617) 439-7500
Counsel for Amicus Curiae

**Counsel of Record*

BlanchardPress, Inc., Boston, Mass. – Law Printers (617) 426-6690

28pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF ... 1

INTERESTS OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. THE OHIO SUPREME COURT'S RULING IS CONTRARY TO THE REASON AND EXPERIENCE OF STATE COURTS CONCERNING THE PROCEDURAL AND SUBSTANTIVE PROTECTIONS AFFORDED BY THE ATTORNEY-CLIENT PRIVILEGE 5

II. THE LOWER COURT'S RULING REPRESENTS AN UNWARRANTED EXPANSION OF THE RECOGNIZED COMMON LAW EXCEPTIONS TO THE ATTORNEY-CLIENT PRIVILEGE 10

TABLE OF CONTENTS - *Continued*

A. The "At Issue" Doctrine 11

B. The "Crime Fraud" Exception. ... 12

III. THE LOWER COURT'S RULING DENIES A DEFENDANT THE PROCEDURAL PROTECTION THAT IS VITAL TO A CITIZEN'S ACCESS TO ADVICE OF COUNSEL 13

IV. THIS UNWARRANTED LIMITATION ON THE ATTORNEY-CLIENT PRIVILEGE WILL IMPAIR THE BUSINESS OF INSURANCE AND THE FAIR AND IMPARTIAL OPERATION OF OUR ADVERSARY SYSTEM OF JUSTICE 17

CONCLUSION 20

TABLE OF AUTHORITIES

Cases **Page(s)**

Aetna Cas. & Sur. Co. v. Superior Court, 153 Cal. App.3d 467, 200 Cal. Rptr. 471 (1984) 8

Arnold v. Mountain West Farm Bureau Mutual Ins. Co., 707 P.2d 161 (Wyo. 1985) 7

Barry v. USAA, 989 P.2d 1172 (Wash. Ct. App. 1999) 16

Brennan v. Western National Mutual Ins. Co., 198 F.R.D. 660 (D.S.D. 2001) 7

Caldwell v. District Court, 644 P.2d 26 (Colo. 1982) 16

Central Construction Co. v. The Home Ind. Co., 794 P.2d 595 (Alaska 1990) 16

Clausen v. National Grange Mutual Ins. Co., 730 A.2d 133 (Del. Super. Ct. 1997) 9

TABLE OF AUTHORITIES - *Continued*

Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 105 S. Ct. 1986 (1985) 18, 19

Dion v. Nationwide Mut. Ins. Co., 185 F.R.D. 288 (D. Mont. 1998) 7

Escalante v. Sentry Ins. Co., 743 P.2d 832, 842 (Wash.Ct. App. 1987), *review denied*, 1988 WL 632337 (Wash. 1988) 16

Ex Parte State Farm Fire & Casualty Company, 2001 WL 306919 (Ala. 2001) 11

Ferrara & DiMercurio v. St. Paul Mercury Ins. Co., 173 F.R.D. 7 (D. Mass. 1997), *aff'd on other grounds*, 240 F.3d 1 (1st Cir. 14, 2001) 7

Guaranty National Ins. Co. v. George, 953 S.W.2d 946 (Ky. App. 1997) 9

Hartford Financial Services Group v. Lake County Park and Recreation, 717 N.E.2d 1232 (Ind. App. 1999) 7,9

TABLE OF AUTHORITIES – *Continued*

In Re Grand Jury Proceedings,
183 F.3d 71, 75 (1st Cir. 1999) 12

Jaffee v. Redmond, 518 U.S. 1, 116 S. Ct.
1923 (1996) 6, 10, 19

Kerr v. U.S. District Court, 426 U.S. 394,
404, 96 S. Ct. 2119, 2124,
48 L. Ed.2d 725 (1976) 17

Maryland Am. Gen. Ins. Co. v. Blackmon
639 S.W.2d 455, 458 (Tex. 1982) 6

Metropolitan Life Ins. Co. v. Aetna Cas.
& Sur. Co., 249 Conn. 36,
730 A.2d 51 (1999) 10,11

National Industrial Transformers, Inc. v.
Atlantic Mutual Ins. Co., 1993
WL 158373 (S.D.N.Y. 1993) 7

Palmer by Diacon v. Farmers Ins.
Exchange, 861 P.2d 895 (Mont. 1993) 6

State ex rel. U.S. Fidelity and Guar. Co. v.
v. Montana Second Judicial Dist
Court, 783 P.2d 911 (Mont. 1989) 8

TABLE OF AUTHORITIES – *Continued*

State ex rel Dudek v. Circuit Court for Milwaukee County, 34 Wis. 2d 559, 150 N.W.2d 387 (1967) 7

Swidler and Berlin v. United States, 524 U.S. 399, 118 S. Ct. 2081 (1998) 5,19

Tackett v. State Farm Fire & Cas. Ins. Co., 653 A.2d 254, 260 (Del. 1995 6,9

Thomas v. First Assurance Life of America, 606 So. 2d 957 (La. App. 3rd Cir. 1992) 6

Trammel v. United States, 445 U.S. 40, 100 S. Ct. 906, 63 L. Ed.2d 186 (1980) 18

United Services Automobile Ass'n v. Werley, 526 P.2d 28 (Alaska 1974) 15

United States v. Zolin, 491 U.S. 554, 109 S. Ct. 2619 (1989) ..... *passim*

Upjohn Company v. United States, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed.2d 584 (1981) 5,19

Other Authority

California Evidence Code, § 954 6

MOTION TO FILE BRIEF *AMICUS CURIAE* OF THE DEFENSE RESEARCH INSTITUTE IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Defense Research Institute (hereinafter "DRI") respectfully moves this court for leave to file the attached Brief *Amicus Curiae* in support of the Petitioner Vanliner Insurance Company (hereinafter "Vanliner" or "Petitioner." Petitioner has given its consent to DRI to file its *Amicus* brief; the Respondent has withheld consent. Letters from both Petitioner and Respondent were submitted to the Court with this brief.

The Defense Research Institute ("DRI"), with over 20,000 members, is the leading national organization of lawyers who represent defendants in civil suits in the United States. Its members come from each of the 50 states, the District of Columbia and the U.S. territories. Membership is voluntary and includes attorneys in private practice, corporate law departments and government. The principal role of the DRI is educational and, through national and local seminars and teaching programs, it seeks to enhance the quality of justice provided in state and local courts and to otherwise enhance the functioning of the civil justice system.

These objectives are accomplished through the publishing of scholarly material, educating the bar and bench through seminars on specialized areas of law, through testimony before Congress and state legislatures on select legislation impacting the civil justice system,

and by participation as amicus curiae on issues of significance to the defense bar and its clients.[1] DRI provides a forum for the networking of state and local defense organizations who share a concern for the proper and efficient operation of the civil justice system.

The severe and unfounded derogation of the attorney-client privilege created by the lower court in this case is contrary to the "reason and experience" of other state courts that have addressed similar questions concerning the attorney-client privilege over the years. If allowed to stand, this unwarranted and unconstitutional restriction upon the procedural and substantive protections afforded by the attorney-client privilege will have a chilling effect on the ability of

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[1]The Defense Research Institute has participated as an *Amicus Curiae* in the past before this Court and others including, in recent months, cases filed in this Court (*Biomet, Inc. v. Dr. Raymond G. Tronzo*, Case No. 01-172, Petition for certiorari from the United States Court of Appeals for the Federal Circuit); in the Supreme Court of Iowa (*Robert A. Wright and Deann K. Wright v. Brooke Group Limited, et al.*, Case No. 01-712, Questions Certified from the United States District Court for the District of Iowa); and in the New York Court of Appeals (*Hamilton v. Beretta U.S.A. Corp.*, Case. No. 99-7753, Question Certified from the United States Court of Appeals for the Second Circuit).

corporations to obtain timely and legal advice from their attorneys. The case is therefore of great practical significance to the DRI's members.

Corporations need to be able to communicate promptly and freely with counsel to ensure that no law is violated or trust impaired. This is particularly true with respect to insurers, as courts and legislatures have imposed extracontractual responsibilities and fiduciary obligations on insurers that require them to take special care in the investigation and disposition of inquiries from insureds. At the same time, insurers must act in accordance with state and federal regulations governing the business of insurance and must consider the interests of the policyholder community at large so that insurance can continue to be sold at an affordable price.

Denying insurers the ability to obtain candid advice of counsel during the critical initial window of time during which recently received requests for insurance coverage are evaluated and investigated by insurers and counsel would impair the ability of insurers to act within the law and to perform as obligated under their policies. More importantly, it would dramatically impair the ability of insurers, at a critical juncture, to seek the advice and assistance of counsel in violation of their due process rights.

The DRI is concerned that the lower court's ruling will be emulated by state and federal courts throughout the land. The DRI is also concerned that this ruling,

while seemingly limited to a narrow question involving allegations of bad faith concerning the contractual responsibilities of uninsured motorists insurers, will serve as a wedge to seal off insurers from obtaining advice of counsel in many other types of cases and, in the long term, will dramatically expand the scope of the crime-fraud exception to many other sorts of disputes involving commercial transactions and business disputes involving other types of corporations.

For these reasons, the DRI hereby respectfully requests that this Court grant the DRI's motion to file its brief *amicus curiae* and further requests that this Court grant Vanliner's Petition for Writ of Certiorari.

Respectfully submitted,

Michael F. Aylward, Esq. *
Richard W. Jensen, Esq.
MORRISON, MAHONEY & MILLER LLP
250 Summer Street
Boston, Massachusetts 02210
(617) 439-7500

Counsel for *Amicus Curiae*

* Counsel of Record

September 14, 2001

BRIEF FOR *AMICUS CURIAE* DEFENSE RESEARCH INSTITUTE[1] IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF INTERESTS OF *AMICUS CURIAE*

The Interests of *Amicus Curiae* Defense Research Institute are set forth in the Motion accompanying this brief.

SUMMARY OF ARGUMENT

The Ohio Supreme Court's ruling that the attorney-client privilege may be completely subverted in any case in which a plaintiff merely alleges that an insurance defendant has acted in bad faith is at odds with the recent experience of the state courts that have evolved the common law governing the attorney-client privilege. In particular, the analysis eliminates the procedural and substantive safeguards that the privilege affords to parties in civil litigation. With respect to the

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[1] Pursuant to Rule 37(6) of the Rules of the Supreme Court of the United States, DRI states that counsel for Petitioner and Respondent had no part in authoring any portion of this brief. Counsel for the DRI authored this brief in its entirety. No person or entity, other than the DRI, its members, or its counsel, made a monetary contribution to the submission of this brief. Petitioner Vanliner Insurance Company has consented to DRI's participation as *Amicus Curiae;* Respondent Boone has not. Vanliner's letter of consent has been filed with the clerk's office.

question of procedural safeguards, the lower court's ruling entirely ignores the threshold elements of proof that this Court has declared in cases such as *United States v. Zolin*, 491 U.S. 554, 109 S. Ct. 2619, 105 L.Ed.2d 469 (1989) must be met in order to fall within recognized exceptions to the privilege, such as those concerning communications engaged in for the purpose of furthering crime or fraud. In *Zolin*, this Court ruled that a party seeking to avoid the privilege on the basis of such an exception must first make a *prima facie* showing of fraud. Second, this *prima facie* case is subject to confirmation by the trial court through an *in camera* review of the disputed documents and communications. Such procedural safeguards protect defendants from an abuse of the discovery process and one-sided access to crucial documents that otherwise serve to undermine the adversary system of justice.

The lower court's refusal to adopt even these threshold protection is a radical departure from the recent experience of the state courts, particularly inasmuch as the *Zolin* standards apply in cases of criminal wrongdoing, a far more serious group of cases than a claim such as this, where an insurer is merely alleged to have acted unreasonably in regard to a policyholder's claim for insurance benefits. As there is no allegation of criminal conduct or fraudulent activity on the part of Vanliner, nor do the communications relate to future conduct in any respect, even the standards in *Zolin* are inadequate to prevent the very sort of fishing expedition that this Court was concerned

about in erecting these safeguards for cases implicating the "crime-fraud" exception.

The "reason and experience" of state supreme courts that have addressed this issue outside of Ohio have emphasized the vital need that insurers have to consult with and obtain the advice and guidance of counsel to guide them in making claims handling determinations. This right to have unfettered access to the advice of counsel is crucial in the period of time with which this case is concerned, the threshold period after which a claim has been received but prior to an insurance company making a final determination as to whether to accept or deny a claim for insurance benefits. The lower court's ruling, if allowed to stand, will have a chilling effect on the willingness of insurers to seek legal advice regarding close coverage questions and will inhibit the flow of information between a lawyer and a client that this Court has repeatedly emphasized as forming the fundamental reason for the existence of this oldest common law privilege. In order to make proper claims determinations and to allow insurance to serve the vital role that it plays in the marketplace by permitting the transfer of risk from policyholders to insurers and insuring that proper claims determinations are made so that claims are properly paid and insurance made available to citizens and businesses at an appropriate cost.

ARGUMENT

The ruling of the Ohio Supreme Court is in conflict with established principles of due process as well as the manner in which courts throughout the nation have interpreted similar principles governing the attorney-client privilege and the rights of citizens to obtain advice of counsel. This issue is vital to the administration of justice in the federal courts, as well as state courts throughout the land. If the lower court's holding is to bind parties in Ohio or to be followed by courts in other jurisdictions, insurers will be seriously compromised in their ability to obtain meaningful, candid or timely access to the advice of counsel, thus denying them legal advice as to claims, some justified and others not, that they may be investigating while corrupting the very process by which these entities are required to do business.

The denial of substantive and procedural due process underlying the lower court's opinion, if followed, will have a chilling impact upon the relationship between corporations and outside counsel. Areas in which corporations once felt themselves free to obtain the advice of counsel to assist and guide them in their conduct, will now be subject to discovery and dispute. Insurers will be forced to either seek advice of counsel at their peril or will go forward without the advice of counsel, with untold impacts upon the manner in which important legal decisions are made.

I. THE OHIO SUPREME COURT'S RULING IS CONTRARY TO THE REASON AND EXPERIENCE OF STATE COURTS CONCERNING THE PROCEDURAL AND SUBSTANTIVE PROTECTIONS AFFORDED BY THE ATTORNEY-CLIENT PRIVILEGE.

The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L. Ed.2d 584 (1981); *Swidler and Berlin v. United States*, 524 U.S. 399, 118 S. Ct. 2081, 141 L.Ed.2d 379 (1998). Its purpose is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice." *Upjohn*, 449 U.S. 389, 101 S. Ct. at 682. Such goals may only be accomplished, however, if clients are permitted to make full disclosure in the free and competent expectation that the information and confidences that they share with attorneys will be protected from discovery in coverage litigation.

In prior decisions, this Court has recognized that its interpretation of the scope of the attorney-client privilege is guided by "the principles of the common law...as interpreted by the courts...in the light of reason and experience." *Swidler and Berlin v. United States*, 524 U.S. at 403, 118 S. Ct. at 2084. In considering the scope of

such privileges, a court must assess whether "reason and experience" "promotes sufficiently important interests to outweigh the need for probative evidence." *Jaffee v. Redmond*, 518 U.S. 1, 9-10, 116 S. Ct. 1923, 1928 (1996).

The lower court's analysis overturns established principles of the common law that are embodied in prevailing case law among the States. Interpreted in the light of reason and experience, that body of law requires that the legal protections accorded to communications between an attorney and a client not be waived without constitutional protections including, at a minimum, requirements that the claimant establish a *prima facie* case for denying the privilege and a court's independent verification by *in camera* review of the claimed documents.

The right to confidential communications between insurers and their attorneys has repeatedly been affirmed by state courts interpreting the common law.[2] *See, e.g. Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 260 (Del. 1995); *Thomas v. First Assurance Life of America*, 606 So. 2d 957, 960 (La. App. 3rd Cir. 1992); *Palmer by Diacon v. Farmers Ins. Exchange*, 861 P.2d 895, 905-06 (Mont. 1993);

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[2]This common law guarantee has been codified in some jurisdictions. *See, e.g., California Evidence Code*, § 954 (protecting "confidential communications" between an insurance company and its attorneys).

Maryland Am. Gen. Ins. Co. v. Blackmon 639 S.W.2d 455, 458 (Tex. 1982); *State ex rel Dudek v. Circuit Court for Milwaukee County*, 34 Wis. 2d 559, 582-83 150 N.W.2d 387, 400 (1967); *Arnold v. Mountain West Farm Bureau Mutual Ins. Co.*, 707 P.2d 161 (Wyo. 1985).

Likewise, federal courts applying state law have refused to find that the attorney-client privilege is abrogated by the mere assertion of a bad faith allegation in the plaintiff's complaint. *See Ferrara & DiMercurio v. St. Paul Mercury Ins. Co.*, 173 F.R.D. 7, 11 (D. Mass. 1997), *aff'd on other grounds*, 240 F.3d 1 (1st Cir. 2001); *Dion v. Nationwide Mut. Ins. Co.*, 185 F.R.D. 288, 294 (D. Mont. 1998); *National Industrial Transformers, Inc. v. Atlantic Mutual Ins. Co.*, 1993 WL 158373 (S.D.N.Y. 1993)(ruling otherwise "would create an unwarranted exception to the attorney-client privilege and result in discovery of privileged communications and work product in virtually every insurance coverage dispute"); *Brennan v. Western National Mutual Ins. Co.*, 198 F.R.D. 660, 663 (D.S.D. 2001)(rejecting plaintiff's argument that an exception to the attorney-client privilege exists in bad faith cases simply because of the nature of the litigation).

Such rulings have recognized the vital role of candid communications in guiding the business of insurance. As noted by the Indiana Court of Appeals, "communications between attorney and client and advice given by the attorney must remain confidential to insure the proper functioning of the legal system."

Hartford Financial Services Group v. Lake County Park and Recreation, 717 N.E.2d 1232, 1237 (Ind. App. 1999).

Likewise, in affirming the confidential nature of communications between an insurer and its coverage counsel, the California Court of Appeals declared in *Aetna Cas. & Sur. Co. v. Superior Court*, 153 Cal. App.3d 467, 474, 200 Cal. Rptr. 471, 474 (1984) that:

> A contrary rule would have a chilling effect on an insurance company's decision to seek legal advice regarding close coverage questions and would dis-serve the primary purpose of the attorney-client privilege – to facilitate the uninhibited flow of information between a lawyer and client so as to lead to an accurate ascertainment and enforcement of rights.

As the Montana Supreme Court opined in *State ex rel. U.S. Fidelity and Guar. Co. v. Montana Second Judicial Dist. Court*, 783 P.2d 911, 916 (Mont. 1989):

> An insurance company must have an honest and candid evaluation of a case, possibly including a 'worst case scenario.' A concern by the attorney that communications would be discoverable in a [third-party] bad faith suit would certainly chill open and honest

> communication. . . . It could also impede settlements.

In *Guaranty Nat'l Ins. Co. v. George*, 953 S.W.2d 946, 948 (Ky. App. 1997), the Kentucky Court of Appeals concluded that a legal opinion obtained by an insurer was protected by the attorney-client privilege and therefore not discoverable in a subsequent bad faith action:

> To develop an exception in bad faith cases against insurers would impede the free flow of information and honest evaluation of claims. In the absence of fraud or criminal activity, an insurer is entitled to the attorney-client privilege to the same extent as other litigants.

In light of these concerns, it is the rule in most states, that "a party cannot force an insurer to waive the protections of the attorney-client privilege merely by bringing a bad faith claim." *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 260 (Del. 1995). As a trial court later commented, "[o]ne of the goals of the Supreme Court's decision in *Tackett* was to make sure that a plaintiff in a bad faith action not be able to go on an expedition into the envisioned 'gold mine' that is the claims file just on the basis of a complaint and answer." *Clausen v. National Grange Mutual Ins. Co.*, 730 A.2d 133, 144 (Del. Super. Ct. 1997).

Likewise, in *Hartford Financial*, 717 N.E.2d at 1237, the Indiana Court of Appeals held that:

> A simple assertion that an insured cannot otherwise prove a case of bad faith does not automatically permit an insured to rummage through the insurer's claims file.

In light of the "reason and experience" of these courts in assessing the vita role of this common law privilege in the insurance context, the Ohio court's "not worthy of protection" exception to the attorney-client privilege is a dangerous and unwarranted infringement on the constitutional protections underlying this oldest and most vital common law privilege.

II. THE OHIO SUPREME COURT'S RULING REPRESENTS AN UNWARRANTED EXPANSION OF THE RECOGNIZED COMMON LAW EXCEPTIONS TO THE ATTORNEY-CLIENT PRIVILEGE.

As this Court has recognized, the policy decisions of the States bear on the question whether to "recognize a new privilege or amend the coverage of an existing one." *Jaffee v. Redmond*, 518 U.S. 1, 13, 116 S. Ct. 1923, 1929-30 (1996).

The States have, in turn, expressed the need for caution before adopting exceptions to this fundamental

privilege. *See, e.g. Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 249 Conn. 36, 52, 730 A.2d 51, 60 (1999)("[e]xceptions to the attorney-client privilege should be made only when the reason for disclosure outweighs the potential chilling of essential communications"). This caution is evident in the manner in which state courts have interpreted the two most commonly recognized exceptions to the privilege: (1) "at issue" waiver and (2) the crime-fraud exception.

A. The "At Issue" Waiver Doctrine.

Like any other party, an insurer can waive the attorney-client privilege. Waiver may occur when an insurer raises its reliance on the advice of counsel as an affirmative defense to a claim of bad faith or other misconduct.

For the most part, courts have interpreted this "at issue" exception conservatively. *See Metropolitan Life*, 730 A.2d at 61(a communication is not "at issue" just because it is relevant, however, nor does "reliance upon legal advice within the process of adhering to contract terms...automatically place the actual legal advice at issue"); *Ex Parte State Farm Fire & Cas. Co.*, 2001 WL 306919 (Ala. 2001)(communications from coverage counsel were not placed at "issue" merely because party sought to have bills for those legal services paid).

Such an explicit "at issue" waiver is wholly different, moreover, from a determination that advice of

counsel automatically loses its privileged character based on the plaintiff's pleadings at the very outset of the case and prior to any adjudication of coverage.

B. The "Crime-Fraud" Exception.

An exception to the attorney-client privilege has also been recognized for communications that are intended to advance a criminal or fraudulent enterprise. *In Re Grand Jury Proceedings*, 183 F.3d 71, 75 (1st Cir. 1999). However, this "crime-fraud" exception plainly has no application here.

First, this exception only applies to future wrongdoing, where Vanliner has been sued for past misconduct only. Second, before the crime-fraud exception to the privilege applies, a claimant must make a threshold showing of its applicability. Finally, in order for the exception to be given effect, the documents in question must be subject to a court's *in camera* review.

Although the lower court did not attempt to rely on the "crime-fraud" exception to support its legal analysis, it is all the more telling that its holding, while broader than would have been permitted under a "crime-fraud" analysis, contains none of the *Zolin* safeguards that this Court has guaranteed with respect to cases in which litigants seek to invoke the "crime-fraud" exception to the attorney-client privilege.

III. THE OHIO SUPREME COURT'S RULING DENIES A DEFENDANT THE PROCEDURAL PROTECTION THAT IS VITAL TO A CITIZEN'S ACCESS TO ADVICE OF COUNSEL.

Apart from these substantive concerns, the Ohio Supreme Court's analysis and, in particular, its finding that a plaintiff may compel disclosure of concededly privileged communications by merely *alleging* bad faith, would eviscerate the procedural protections that this Court has recognized are essential to a citizen's right to counsel. In particular, the lower court denied the petitioner the protection of the attorney-client privilege without (1) any threshold showing by the claimant that there was factual support for his allegations or (2) permitting *in camera* inspection of the subject documents by the trial court to confirm whether they fell within the crime-fraud exception or some other constitutionally-recognized exception to the privilege. In so doing, the lower court failed to follow the teachings of this Court or the reason and experience of state courts.

In *United States v. Zolin*, 491 U.S. 554, 109 S. Ct. 2619, 105 L.Ed.2d 469 (1989), this Court set forth the parameters for the use of *in camera* review in cases where parties assert the crime-fraud exception to the attorney-client privilege. First, "the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person" that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies. 491 U.S. at

472, 109 S. Ct. at 2631. At the same time, this Court recognized the need for careful procedures to be undertaken in connection with such review:

> A blanket rule allowing *in camera* review as a tool for determining the applicability of the crime-fraud exception...would place the policy of protecting open and legitimate disclosure between attorneys and clients at undue risk. There is also reason to be concerned about the possible due process implications of routine use of *in camera* proceedings. Finally, we cannot ignore the burdens *in camera* review may place upon the district courts, which may well be required to evaluate large evidentiary records without open adversarial guidance by the parties.
>
> There is no reason to permit opponents of the privilege to engage in groundless fishing expeditions, with the district courts as their unwitting (and perhaps unwilling) agents. Courts of Appeals have suggested that *in camera* review was available to evaluate claims of crime or fraud "only when justified" or "in appropriate cases."...We agree. (Case citations omitted).

Zolin, 491 U.S. at 571, 109 S.Ct. at 2630.

Therefore, "before engaging in *in camera* review to determine the applicability of the crime-fraud exception, the judge should require showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies."

Zolin, 491 U.S. at 572, 109 S.Ct. at 2631.

In contrast to *Zolin* and state court cases that have since embraced its standard, *Vanliner* stands alone in recognizing a previously unstated exception for conduct that is "unworthy" of protection. All previous bad faith cases that have reached this result have done so on the basis of the "crime-fraud" exception (likening bad faith to a species of fraud) and have therefore afforded insurers the procedural safeguards guaranteed by this Court in *Zolin*. *Vanliner* stands alone in denying defendants these protections.

In *United Services Automobile Ass'n v. Werley*, 526 P.2d 28 (Alaska 1974), the Alaska Supreme Court declared that a policyholder claiming bad faith might, under certain circumstances, be entitled to obtain privileged claim materials possessed by its insurer. The court ruled that the insured must do more than allege bad faith, however. Rather, it must make a *prima facie* showing of fraud, such that "the evidence in favor of a proposition be sufficient to support a finding in its favor, if all the evidence to the contrary be disregarded." *Id.* at

32, n.15. Further, as the Alaska Supreme Court has since declared in *Central Construction Co. v. The Home Ind. Co.*, 794 P.2d 595, 600 (Alaska 1990), quoting *Zolin*, "the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person" that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.

Likewise, in *Caldwell v. District Court*, 644 P.2d 26 (Colo. 1982), the Colorado Supreme Court ruled that an insured seeking to compel the disclosure of privileged documents in an insurance bad faith case must do more than merely allege fraud or bad faith. In order to prevail, the party attempting to show that the exception to the privilege applies must first make "a factual showing 'adequate to support a good faith belief by a reasonable person that wrongful conduct sufficient to invoke the . . . fraud exception . . . has occurred.'" *Id.* at 33. If the trial court finds the requisite factual showing has been made, the requested documents are subject to an *in camera* inspection, at the trial court's discretion, to determine whether there is a "foundation in fact for the charge." *Id.*. *Accord Escalante v. Sentry Ins. Co.*, 743 P.2d 832, 842 (Wash.Ct. App. 1987), *review denied*, 1988 WL 632337 (Wash. 1988). If the insured cannot make this threshold showing, however, there is no need for *in camera* review of the disputed documents. *Barry v. USAA*, 989 P.2d 1172, 1176 (Wash. Ct. App. 1999)(affirming privilege in light of insured's failure to establish initial "factual showing").

As in *Zolin* and *Kerr v. U.S. District Court*, 426 U.S. 394, 404, 96 S.Ct. 2119, 2124, 48 L.Ed.2d 725 (1976), it is constitutionally impermissible to restrict the scope of the privilege in the manner proposed by the Ohio Supreme Court without providing for some sort of threshold showing of proof by the claimant that is then subject to independent verification by the court through an *in camera* inspection of the documents in question. This *in camera* inspection, while arguably prejudicial to the defendant's rights since the trial judge's views may be affected by the contents of the documents that he or she inspects, at least provides a threshold safeguard against the potential for abuse of discovery inherent in the unguarded approach authorized by the Ohio Supreme Court.

In light of the careful guidance set forth by this Court in *Zolin*, with respect to an exception to the privilege in cases of criminal wrongdoing, it is all the more shocking that the privilege should be denied to a civil litigant in a case that merely involves unsupported allegations of unreasonable conduct that do not rise to the level of criminal wrongdoing.

IV. THE OHIO SUPREME COURT'S LIMITATION ON THE ATTORNEY-CLIENT PRIVILEGE WILL IMPAIR THE BUSINESS OF INSURANCE AND FAIR AND IMPARTIAL OPERATION OF OUR ADVERSARY SYSTEM OF JUSTICE.

Insurance plays an important role in the commerce of the United States by allowing citizens and businesses to transfer risk to insurers. As this Court recognized in *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 348, 105 S. Ct. 1986 (1985),the protections afforded by the attorney-client privilege are no less important to corporations than they are to individual citizens.

Owing to the significance of insurance, the States have enacted various statutes governing the manner in which insurers investigate and handle claims, and have established significant statutory and common law penalties for mishandling claims or acting unfairly or deceptively. At the same time, the very value of insurance is subverted if insurers are obliged to pay unwarranted claims, diverting resources away from where they are needed and driving up the costs of insurance for all policyholders.

This Court has recognized that the protection of the attorney-client privilege is not without its consequences. In particular, that information that is indubitably relevant may thereby be shielded from discovery. *Trammel v. United States*, 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L. Ed.2d 186 (1980). At the same time, it is recognized that the adversary system of justice ceases to function where one side is deprived of unfettered access to counsel at an early and critical stage of the development of a legal dispute or, alternatively,

where the legal advice that it obtains is fully discoverable by its adversary.

In light of these concerns, this Court has been properly cautious in imposing restrictions on the attorney-client privilege and, indeed, has affirmed its expanded scope in recent cases. *See, e.g. Swidler and Berlin v. United States*, 524 U.S. 399, 118 S. Ct. 2081 (1998)(privilege persists even after death of attorney) and *Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923 (1996)(recognizing similar privilege for statements made to a psychotherapist).

By promoting full and frank communications between attorneys and their clients, the attorney-client privilege encourages observation of the law and aids in the administration of justice. *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 348, 105 S. Ct. 1986 (1985) and *Upjohn v. United States*, 449 U.S. at 389, 101 S.Ct. at 682. Contrariwise, requiring corporations to "fly blind" by denying them unfettered access to counsel at the crucial early stage of claims handling where insurers must considered whether or how to address a demand for insurance coverage will not assist the administration of justice or the proper functioning of our adversarial system.

The common law and the Constitution contain no authority to support the Ohio Supreme Court's unwarranted abrogation of the attorney-client privilege or its creation of an unprecedented elimination of the

privilege based upon a mere allegation of bad faith. Such a cramped construction of the privilege and its resulting infringement on the rights and contractual expectations of the petitioner Vanliner constitutes reversible error that must be reviewed and corrected by this Court. For these reasons, the Defense Research Institute respectfully urges this Court to grant Vanliner's Petition for a Writ of Certiorari

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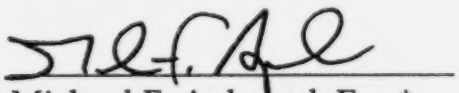
CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



Michael F. Aylward, Esq.*
Richard W. Jensen, Esq.
MORRISON, MAHONEY & MILLER,
250 Summer Street
Boston, Massachusetts 02210
(617) 439-7500

Counsel for *Amicus Curiae*

* Counsel of Record

September 14, 2001

Supreme Court, U.S.
FILED
SEP 19 2001
OFFICE OF THE CLERK

No. 01-303

In The

Supreme Court of the United States

VANLINER INSURANCE COMPANY,

Petitioner,

v.

RICHARD BOONE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF IN OPPOSITION

RICHARD H. H. TROXELL
Counsel of Record

BLUE WILSON + BLUE
471 East Broad Street, Suite 1100
Columbus, Ohio 43215
(614) 224-6969

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS WHY THE WRIT SHOULD BE DENIED .. 2

I. THE FEDERAL CONSTITUTIONAL ISSUES RAISED BY PETITIONER ARE NOT PROPERLY BEFORE THIS COURT BECAUSE PETITIONER FAILED TO PROPERLY PRESERVE THESE ISSUES IN THE STATE COURT 2

II. THE STATE COURT DECISION RESTS UPON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS THAT DEFEAT JURISDICTION IN THIS COURT 5

CONCLUSION 5

TABLE OF AUTHORITIES

Page

CASES:

Adams v. Robertson, 520 U.S. 83 (1997).....2, 3, 4, 5

ASARCO, Inc. v. Kadish, 490 U.S. 605 (1989)..... 5

Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) 2, 3

Cardinale v. Louisiana, 394 U.S. 437 (1969) 4

Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) 3

Fuller v. Oregon, 417 U.S. 40 (1974)..... 3

Hanson v. Denckla, 357 U.S. 235 (1958)..... 3

Illinois v. Gates, 462 U.S. 213 (1982) 4

McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940) 3

Street v. New York, 394 U.S. 576 (1969) 3

Webb v. Webb, 451 U.S. 493 (1981).....2, 4

Yee v. Escondido, 503 U.S. 519 (1992)..... 2

STATUTES:

28 U.S.C. § 1257(a) 1, 2

Ohio Revised Code §§ 1343.03 and 2317.02..... 5

OTHER AUTHORITIES:

Ohio Civil Rule 26 5

Supreme Court Rule 14.1(g)(i)..... 1, 3, 4

JURISDICTION

This Court's jurisdiction under 28 U.S.C. § 1257(a) is in doubt because Petitioner failed to preserve any federal constitutional issues in the state courts, and because the decision of the Supreme Court of Ohio rests upon adequate and independent state law grounds. Petitioner has failed to provide the jurisdictional information required by Supreme Court Rule 14.1(g)(i).

STATEMENT OF THE CASE

Petitioner's Statement of the Case contains misstatements and omissions of fact.

One important omission is that in the course of this litigation, Petitioner Vanliner Insurance Company eventually admitted, on May 4, 1998, years after the automobile accident, that Respondent Richard Boone was entitled to the underinsured motorist coverage that Petitioner had denied him.

Another omission is the fact that Petitioner had charged and accepted premium payments for the underinsured motorist coverage it claimed did not exist when it came time to honor a claim under the coverage.

Any suggestion that Petitioner filed suit to obtain the $100,000 policy limits settlement paid by the at-fault driver to Respondent is inaccurate. In fact, Petitioner delayed settlement by claiming a right to ninety-five percent of the settlement monies to satisfy a lien for workers' compensation benefits received by Respondent under a separate policy issued by Petitioner. It was this over-

reaching on the part of Petitioner which prompted Respondent to seek counsel.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE FEDERAL CONSTITUTIONAL ISSUES RAISED BY PETITIONER ARE NOT PROPERLY BEFORE THIS COURT BECAUSE PETITIONER FAILED TO PROPERLY PRESERVE THESE ISSUES IN THE STATE COURT.

Petitioner has failed to preserve the federal constitutional issues raised for the first time in its petition for certiorari because these issues were not "pressed or passed on below."

With "very rare exceptions," this Court adheres to the rule that, in reviewing state court judgments under 28 U.S.C. § 1257, federal claims will not be considered unless the federal claims were either addressed by, or properly presented to, the state court that rendered the decision. *Adams v. Robertson*, 520 U.S. 83, 86 (1997); *Yee v. Escondido*, 503 U.S. 519, 533 (1992). "It is well settled that this Court will not review a final judgment of a state court unless 'the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.' " *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (quoting *Webb v. Webb*, 451 U.S. 493, 496-497 (1981)).

This Court considers federal questions which were not preserved in the courts below only in exceptional cases and only when the cases come directly from the

federal courts. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

It is the Petitioner's burden to show that the federal issues were properly presented to the state court. *Adams*, 520 U.S. at 86; Sup. Ct. R. 14.1(g)(i). When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n. 3 (1983) (quoting *Fuller v. Oregon*, 417 U.S. 40, 50 n. 11 (1974) (in turn quoting *Street v. New York*, 394 U.S. 576, 582 (1969)). Stated differently, when the highest state court is silent on a federal question before this Court, the Court will assume that the issue was not properly presented, and Petitioner bears the burden of defeating this presumption. *Adams*, 520 U.S. at 86-87 (citing *Board of Directors of Rotary Int'l*, 481 U.S. at 550).

Raising a federal issue for the first time on a motion for reconsideration or petition for rehearing does not suffice – this Court generally refuses to consider issues raised clearly for the first time on a petition for rehearing when the state court is silent on the question. *Adams*, 520 U.S. at 89, n. 3; see *Board of Directors of Rotary Int'l*, 481 U.S. at 550; *Hanson v. Denckla*, 357 U.S. 235, 244, n. 4 (1958).

Tellingly, although Petitioner seeks review of a state court judgment, Petitioner has failed to comply with Supreme Court Rule 14.1(g)(i), which requires that Petitioner set forth, in the Statement of the Case, the stage of the state court proceedings in which the federal questions

sought to be reviewed were raised, the method or manner of raising them, and the place in the record where the matter appears. Petitioner cannot comply with Supreme Court Rule 14.1(g)(i) because Petitioner never raised the federal constitutional issues in the state courts.

Several important purposes underlie the rule of denying jurisdiction where federal issues were not "pressed or passed on below." The rule serves an important issue of comity; as the Court has explained before, " 'it would be unseemly in our dual system of government' to disturb the finality of state court judgments on a federal ground that the state court did not have occasion to consider." *Adams*, 520 U.S. at 90 (quoting *Webb*, 451 U.S. at 500). By requiring that federal arguments first be raised in the state courts, this Court allows state courts to resolve issues on adequate and independent state law grounds. *Illinois v. Gates*, 462 U.S. 213, 222 (1982) (citing *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969)). The rule also reflects "practical considerations" relating to this Court's capacity to decide issues by promoting the creation of an adequate factual and legal record. *Adams*, 520 U.S. at 90-91 (citing *Webb*, 451 U.S. at 500). All of these considerations apply in this case. The state courts did not have proper occasion to consider Petitioner's federal constitutional arguments because Petitioner never made these arguments in the state courts, and the legal or factual record is inadequate or nonexistent.

II. THE STATE COURT DECISION RESTS UPON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS THAT DEFEAT JURISDICTION IN THIS COURT.

Not only has Petitioner failed to carry its burden of showing that Petitioner's federal constitutional arguments were properly presented to the state court, but the state court decision rests upon adequate and independent state law grounds that defeat jurisdiction in this Court. See *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 624 (1989). The state court decision rests upon the extension of prior state court case law to the facts of this case. (See Pet. App. at A.6 – A.9). The only rules and statutes at issue were Ohio Civil Rule 26 and Ohio Revised Code §§ 1343.03 and 2317.02. (See Pet. App. at A.3 – A.4, n. 2). The federal constitutional provisions now cited by Petitioner were never at issue because Petitioner did not cite these provisions in arguments before the state courts. Moreover, failure to follow state rules for raising federal constitutional issues in the state courts constitutes an adequate and independent ground for the state courts to disregard those claims. See *Adams*, 520 U.S. at 87-88. As such, the decision of the Supreme Court of Ohio rests upon adequate and independent state law grounds that are not subject to review in this Court.

CONCLUSION

The Petition should be denied because Petitioner failed to properly preserve the federal constitutional issues below and because the decision of the Supreme

Court of Ohio rests upon adequate and independent state law grounds.

Respectfully submitted,

RICHARD H. H. TROXELL
Counsel of Record

BLUE WILSON + BLUE
471 East Broad Street, Suite 1100
Columbus, Ohio 43215
(614) 224-6969

Attorney for Respondent

(4)

Supreme Court, U.S.
FILED
OCT 9 2001
CLERK

No. 01-303

In The

Supreme Court of the United States

VANLINER INSURANCE COMPANY,

Petitioner,

v.

RICHARD BOONE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

REPLY BRIEF

RICHARD HODYL, JR.
Counsel of Record
MARK R. MISIOROWSKI
WILLIAMS MONTGOMERY & JOHN LTD.
Twenty North Wacker Drive
Suite 2100
Chicago, Illinois 60606
(312) 443-3200

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

30 pp

THE OHIO SUPREME COURT'S DECISION IGNORES THE FUNDAMENTAL CONSTITUTIONAL RIGHTS THAT VANLINER HAS TO PROTECT ITS CONVERSATIONS WITH ITS ATTORNEY.

This Court's jurisdiction is not in question because Federal Constitutional issues were raised and were preserved by both parties in the state courts.

Richard Boone, in his memorandum of support of jurisdiction of appellant Richard Boone, argued to the Ohio Supreme Court that the decision of the Ohio Court of Appeals "sets a precedent that would hobble the pursuit of truth and justice in cases in which an insurer's claim might reasonably be expected to cast light upon an insurer's motivations in denying coverage. . . . " See App. 4-5.

Boone further raised due process arguments in his Memorandum in Support of Jurisdiction of Appellant Richard Boone. There, Boone argued that the Ohio appellate court's decision should be reviewed by the Ohio Supreme Court to provide guidance on a "novel issue," see App. 3, that may create "inconsistent appellate ruling on the issue of an insured's right to discovery to an insurer's claim file in the course of an action for bad faith denial of coverage or benefits." See App. 3.

In Boone's own pleadings filed before the Supreme Court of Ohio, Boone raised fundamental fairness and due process issues as the evidence above shows.

The petitioner, Vanliner, also raised constitutional issues of the right to counsel and due process in its own documents filed before the Supreme Court of Ohio. In

Vanliner's Memorandum in Opposition of Jurisdiction of appellee's Vanliner Insurance Company, Vanliner clearly raises the question of the right to maintain the attorney-client privilege and cites this Court's decision in *Upjohn v. United States*, 449 U.S. 383, 389 (1981).

Based on the foregoing both Vanliner and Boone have preserved the constitutional issues that are the subject of Vanliner's petition for writ of certiorari to this Court. The issues are clearly identified in Vanliner's petition in the Statement of the Case section where Vanliner specifically states that the Ohio Supreme Court's ruling on the attorney-client privilege was in error and Vanliner specifically cites to the opinion of the Ohio Supreme Court which was attached as an exhibit in the Appendix to the petition for writ of certiorari.

Vanliner set forth in detail in its petition the reasons why this petition should be granted and federal constitutional basis upon which the petition is based. Boone's Brief in Opposition to the petition ignores the fact that due process questions were raised by both parties before the Ohio Supreme Court and that Justice Cook of the Ohio Supreme Court performed a scholarly and detailed analysis of decisions by this Court regarding the history, basis and scope of the attorney-client privilege. Thus, the petition for writ of certiorari should be granted because the question is properly before this Court for a jurisdictional standpoint as well as a subject matter standpoint.

CONCLUSION

The petition for writ of certiorari should be granted for the reasons set forth in this reply as well as those raised in Vanliner's petition for writ of certiorari.

Respectfully submitted,

WILLIAMS MONTGOMERY & JOHN LTD.
RICHARD HODYL, JR.
MARK S. MISIOROWSKI

IN THE SUPREME COURT OF OHIO

Richard Boone, Plaintiff-Appellant, v. Vanliner Insurance Company, et al., Defendant-Appellees.	00-104 On Appeal from the Franklin County Court of Appeals, Tenth Appellate District Court of Appeals Case No. 98AP-1535

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT RICHARD BOONE

(Filed Jan. 18, 2000)

Richard H. H. Troxell (0066395)
Wolske & Blue
580 South High Street, Suite 300
Columbus, Ohio 43215
(614) 228-6969
Fax No. (614) 228-4367

COUNSEL FOR APPELLANT, RICHARD BOONE

Mark S. Maddox (0029852)
Frost & Maddox
400 South Fifth Street, Suite 301
Columbus, Ohio 43215-5430
(614) 224-0933
Fax No. (614) 224-0959

COUNSEL FOR APPELLEES, VANLINER INSURANCE COMPANY, ET AL.

TABLE OF CONTENTS

Page

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST 1

STATEMENT OF THE CASE AND FACTS 3

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW 6

Proposition of Law: In an action by an insured for bad faith denial of insurance coverage or benefits, neither the attorney-client privilege nor the so-called work product exception precludes discovery of an insurer's claims file..... 6

CONCLUSION 12

PROOF OF SERVICE 13

APPENDIX 14

Opinion of the Franklin County of Appeals (December 2, 1999)

Judgment Entry of the Franklin County Court of Appeals (December 2, 1999)

Ohio Civil Rule 26

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

The Ohio bench and bar require a definition of what is and is not a privileged communication in an insurer's claims file for purposes of discovery in an action for bad faith denial of insurance coverage. Specifically, the Ohio bench and bar need to know whether the rationale that limits the definition of privileged communications in an action for prejudgment interest also applies to an action for bad faith denial of insurance coverage.

Discovery disputes such as this one are now immediately appealable, and this Court's timely guidance on this novel issue is required to avoid long interruptions in the course of litigation and the potential for inconsistent appellate rulings on the issue of an insured's right of discovery to an insurer's claims file in the course of an action for bad faith denial of coverage or benefits. R.C. 2505.02(B)(4), effective July 22, 1998, broadened the definition of a final appealable order to include discovery orders bearing on claims of privilege. As a result, the appeals courts likely will experience a much greater involvement in discovery disputes such as this, where an insured seeks to discover an insurer's claims file for evidence of bad faith in the denial of coverage or benefits. This Court's guidance in this case will reduce uncertainty and delays in other cases, and help to ensure uniformity in decisions involving an insured's right of access to an insurer's claims file over the claim of attorney-client privilege.

In an action for prejudgment interest pursuant to R.C. 1343.03(C), where the purpose of discovery is to seek

the truth regarding whether an insurer reasonably evaluated its liability and made a good faith effort to settle, an insurer's claims file is subject to discovery, and the attorney-client privilege is limited, and shields from discovery only those documents (or portions of documents) that contain communications that go directly to the theory of defense. *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St. 3d 638, 662; *Peyko v. Frederick* (1986), 25 Ohio St. 3d 164, paragraph one of the syllabus. The decisions in *Moskovitz* and *Peyko* acknowledged that where the reasonableness of an insurer's conduct in addressing a claim is at issue, nothing is more relevant than the insurer's claims file. *Moskovitz*, 69 Ohio St. 3rd at 661.

In this case, the trial court held that, because the issue in both actions is the reasonableness of an insurer's conduct, the rationale of *Moskovitz* applies with equal force to an action for bad faith denial of insurance coverage. Thus, after conducting an *in camera* review of the claims file, the trial court ordered the production of a number of documents from the claims file over Vanliner's claims of work-product and attorney-client privilege.

The court of appeals ruled that the trial court erred in extending the rationale of *Peyko* and *Moskovitz* to this case, erroneously suggesting that *Peyko* and *Moskovitz* were decided as they were because "the attorney-client privilege and work-product doctrine no longer applied because the underlying case had been decided." Thus, the issue here is whether the rationale of *Peyko* and *Moskovitz* applies to insurance bad faith claims.

The decision of the court of appeals sets a precedent that would hobble the pursuit of truth and justice in cases

in which an insurer's claims file might reasonably be expected to cast light upon an insurer's motivations in denying insurance coverage, as well as the insurer's actual knowledge as to whether denial of coverage was reasonable, justifiable, or legal. In some cases, communications between an attorney and an insurer may be the only evidence of what an insurer knew and when it knew it, and the court of appeals decision would preclude access even to documents that reflect that an insurer denied coverage despite the advice of counsel that the insurer would be acting unreasonably, incorrectly, or even unlawfully in doing so. The decision by the court of appeals undermines the entire purpose of an action for bad faith denial of insurance coverage or benefits, *i.e.*, to ascertain the truth regarding whether an insurer had reasonable justification for denying coverage or benefits.

The sheer pervasiveness of insurance in the day-to-day lives of Ohio citizens, combined with the immense wealth of the insurance industry – and the concomitant ability of insurers to vigorously defend any claims brought against them – makes it all the more important that the bench and bar be provided ground rules for discovery in an action for bad faith denial of coverage or benefits. As the court in *U.S. v. South-Eastern Underwriters Ass'n* (1944), 322 U.S. 533, 540 stated: "Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, family, and the occupation or the business of almost every person in the United States." Hence, it is of public or great general interest that

this Court define what is and is not a privileged communication in an insurer's claims file for purposes of discovery in an action for bad faith denial of insurance coverage.

STATEMENT OF THE CASE AND FACTS

This appeal from the Trial Court's discovery order of November 9, 1998, stems from Plaintiff-Appellant Richard Boone's need for an insurance claims file to prove his insurance bad faith claim arising from the evaluation and subsequent denial of his claim for underinsured motorist coverage. Mr. Boone is an over-the-road truck driver, and a resident of Ohio. Defendant-Appellee Vanliner Insurance Company (Vanliner) is a Missouri-based insurance company which issued a commercial vehicle policy to Mr. Boone, individually, and also his Ohio employer, with Mr. Boone listed as a named insured.

The coverage dispute arises out of a June 12, 1995 motor vehicle accident involving three vehicles on the Interstate 275 beltway outside Tampa, Florida. Mr. Boone was seriously injured in the accident, and spent months in various hospitals in rehabilitation centers, where he incurred in excess of $100,000.00 in surgical bills and other medical and therapy expenses. Mr. Boone also missed many months of work. Since the time he originally was released from his doctors' care, he has endured infections and other complications associated with from [sic] the surgical hardware implanted in his legs, and he has had to undergo additional surgery to remove the hardware. Mr. Boone continues to suffer from the injuries to

his knee joints, and expects to incur future medical bills, diminished mobility and arthritis.

An insurance carrier for one of the other drivers involved in the accident paid its policy limit of $100,000.00 toward Mr. Boone s [sic] injuries and damages. Mr. Boone then sought underinsured motorist benefits under the insurance policies issued by Vanliner. Although a premium had been taken for underinsured motorist coverage, Vanliner denied coverage on September 16, 1996, citing a policy exclusion which Vanliner maintained excluded Mr. Boone's vehicle from coverage. Vanliner also refused to provide copies of the policies to Mr. Boone's counsel, and questioned the application of Ohio law to its policy obligations. Mr. Boone brought this action against Vanliner on June 12, 1997, to establish his right to underinsured motorist coverage, and to pursue a bad faith claim against Vanliner for its conduct in assessing and denying his underinsured motorist coverage. On May 4, 1998, Vanliner finally admitted the existence of $1 million in underinsured motorist coverage under both policies conceded the issue of coverage and, presumably, conceded the application of Ohio law, but Vanliner has never indicated any real willingness to acknowledge that Mr. Boone has a valid claim for underinsured motorist benefits.

Mr. Boone sought to discover Vanliner's claims file, but Vanliner resisted discovery on the basis of relevancy, work-product, and attorney-client privilege. Applying the reasoning set forth in *Moskovitz*, the trial court conducted an *in camera* inspection and ultimately overruled all objections based in relevancy, and also overruled certain objections based in work-product and the attorney-

client privilege, and that concerned information that did not go directly to the theory of defense to the bad faith claim.

Some of the documents for which Vanliner asserts the attorney-client privilege date from 1996, before the lawsuit was filed in June 1997, and well before Vanliner admitted the existence of coverage in May 1998. Plaintiff Richard Boone suspects that these communications concern an effort on the part of Vanliner to determine whether he was correct in his assertions that Ohio law governed the interpretation of underinsured motorist coverage, and that he was entitled to underinsured motorist coverage. Plaintiff Richard Boone further suspects that Vanliner was advised by counsel in 1996 that he was correct, *i.e.*, that Ohio law governed the interpretation of underinsured motorist coverage and that he was entitled to coverage, but Vanliner continued to deny coverage until well after Mr. Boone was forced to file suit in 1997. If Plaintiff's suspicions are accurate, there can be no better evidence that Vanliner acted unreasonably than the fact that Vanliner continued to deny coverage even after being advised by counsel that Ohio law applied, and that Mr. Boone was entitled to underinsured motorist coverage.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: **In an action by an insured for bad faith denial of insurance coverage or benefits, neither the attorney-client privilege nor the so-called work product exception precludes discovery of an insurer's claims file.**

The need to discover an insurer's claims file applies with equal force in an action for prejudgment interest and an action for bad faith denial of insurance coverage. In an R.C. 1343.03(C) action for prejudgment interest, the issue is whether the insurer acted reasonably in evaluating its potential liability and made a good faith effort to settle. *See Moskovitz*, 69 Ohio St. 3d at 658. Often, the only way for a party to prove or disprove the reasonableness of an insurer's conduct is by obtaining the insurer's claims file. *Moskovitz*, 69 Ohio St. 3d at 661. Thus, a party seeking prejudgment interest may obtain an insurer's claims file through the discovery process, save for those portions of the claims file that are shown by the defense to be privileged attorney-client communications. *See Peyko*, 25 Ohio St. 3d at paragraph one of the syllabus.

In *Moskovitz*, also a case involving prejudgment interest, this Court addressed the scope of the attorney-client privilege where an insurer's claims file is sought for evidence of the insurer's conduct. The Court held that "neither the attorney-client privilege nor the so-called work product exception precludes discovery of an insurer's claims file. The only privileged matters contained in the file are those that go directly to the theory of defense of the underlying case. . . . " *Moskovitz*, 69 Ohio St. 3d at 662. The *Moskovitz* court declared that where the

purpose of R.C. 1343.03(C) to encourage good faith settlement efforts would otherwise be thwarted, "a search for the truth . . . cannot be hindered by claims of attorney-client privilege," and that "[d]ocuments and other things showing the lack of a good faith effort to settle by a party or the attorneys acting on his or her behalf are wholly unworthy of the protections afforded by any claimed privilege." *Moskovitz,* 69 Ohio St. 3d at 661.

The rationale of *Moskovitz* is consistent with the established principle that the attorney-client privilege exists to aid in the administration of justice and must yield in circumstances where justice so requires. *See Lemley v. Kaiser* (1983), 6 Ohio St. 3d 258.

In an insurance bad faith claim, the issue is whether the insurer's denial of coverage or benefits was predicated on circumstances that furnish reasonable justification for the denial. *Zoppo v. Homestead Insurance Co.* (1994), 71 Ohio St. 3d 552, paragraph one of the syllabus. Thus, although *Peyko* and *Moskovitz* both involved a claim for prejudgment interest, rather than a bad faith claim, the issue in both types of cases is the reasonableness of the insurer's conduct. There is little difference between assessing whether an insurer reasonably evaluated its liability and made a good faith effort to settle in the context of an action for prejudgment interest, and whether an insurer denied coverage with reasonable justification therefore, in the context of a bad faith claim. The core principle – that access to the claims file is necessary to assess the conduct of the insurer – is the same in pursuit of both prejudgment interest and bad faith claims.

Moreover, this Court has held that when the truth regarding whether an insurer has acted in good faith is squarely at issue, the attorney-client privilege is limited, and shields from discovery only those documents (or portions of documents) that contain communications that go directly to the theory of defense.

> The time has come for this court to define what is and is not a privileged communication in an insurer's claims file for purposes of discovery in an R.C. 1343.03(C) proceeding for prejudgment interest. In our judgment, only those attorney-client communications contained in an insurer's claims file that go directly to the theory of defense are to be excluded from discovery. To hold otherwise would be to undermine the entire purpose of a hearing on the issue of prejudgment interest, *i.e.*, to ascertain the truth regarding good faith efforts to settle.

Moskovitz, 69 Ohio St. 3d at 662. While *Moskovitz* involved a claim for prejudgment interest, the rationale – that access to an insurers claims file is necessary to assess the reasonableness of the insurer's conduct – applies with equal force to an insurance bad faith claim. The purpose of discovery in both an action for prejudgment interest and an action for insurance bad faith is to obtain evidence ascertaining the truth regarding the good faith and reasonableness of the insurer in reaching its decision to deny coverage. Thus, the court of appeals erred in refusing to extend the rationale of *Peyko* and *Moskovitz* to actions for the unreasonable denial of benefits, and Plaintiff Richard Boone is entitled to even those documents in Vanliner's

claims file that constitute attorney-client communications, except for those documents (or portions of documents) that go directly to Vanliner's theory of defense to the bad faith claim.

The court of appeals refused to apply the rationale of *Moskovitz* to this case based on the erroneous legal premise that the attorney-client privilege expires with the resolution of a case. The court of appeals reasoned that the rationale of *Moskovitz* does not apply because *Moskovitz* involved proceedings pursuant to R.C. 1343.03(C) for prejudgment interest, in which the attorney-client privilege "no longer applied because the underlying case had been decided." Thus, the court of appeals declared that *Moskovitz* was distinguishable because this case is "still in progress" and, presumably, the attorney-client privilege still applied. But the attorney-client privilege still applied in *Moskovitz*, too, and the notion that the attorney-client privilege no longer applies after a case has been decided is wholly erroneous. The attorney-client privilege survives not only a decision in the case, but also the termination of the attorney-client relationship, and even the death of the client. *See American Motors Corp. v. Huffstutler* (1991), 61 Ohio St. 3d 343, 346; *Taylor v. Sheldon* (1961), 172 Ohio St. 118, paragraph 2 of the syllabus. In fact, this Court, in *Moskovitz*, made it implicitly clear that the attorney-client privilege still applied in that case by ruling that, although the privilege must yield to the search of the truth of whether the insurer acted in good faith, the privilege did apply to those communications that went to the theory of the defense of that already decided case. *Moskovitz*, 69 Ohio St. 3d at 662. Hence, the court of

appeals erred in distinguishing *Moskovitz* on the erroneous premise that the attorney-client privilege no longer applied in *Moskovitz* because the underlying case had been decided.

The court of appeals also reasoned that certain documents need not be produced because the documents "were generated after the lawsuit was filed," ignoring the fact that Vanliner did not admit coverage until nearly a year after the lawsuit was filed. In addition, there is nothing that would prevent the jury from finding that Vanliner acted in bad faith in continuing to deny coverage and refusing to reconsider the issue of coverage after the initial denial and even after Plaintiff filed suit. Mr. Boone should have every right to discover what Vanliner knew about the merits of its denial of coverage, and when Vanliner knew it. Even later-prepared documents on this subject could provide insight or information as to Vanliner's actions or motivations in originally denying coverage, as well as what new facts, if any, sparked Vanliner to later admit coverage. In sum, just because a document was generated after the lawsuit was filed does not necessarily mean that the document cannot shed any light on the reasonableness of Vanliner's conduct in denying coverage.

Documents prepared after the commencement of litigation might also reflect on an insurer's attitude and approach generally to the rights of its insureds. If, for example, the claims file reveals that the insurer sought to evade other obligations under the policy, *e.g.*, access to arbitration, such evidence might tend to suggest that the insurer followed policies intended to evade its obligations under the policy.

Finally, sufficient good cause exists, in the context of an insurance bad faith claim, to pierce the so-called work product privilege. Civil Rule 26(B)(3) provides that a party may obtain discovery of even documents prepared in anticipation of litigation or for trial by or for another party or that other party's representative, including his attorney, upon a showing of "good cause." Moreover, as acknowledged in *Moskovitz*, where an insurer's conduct in the course of investigating, evaluating and/or settling a claim is at issue, the claims file is often the sole source of evidence going to the heart of the plaintiff's claim. As such, "good cause" naturally exists to justify a plaintiff's right of access to an insurer's claims file in the context of an insurance bad faith case, and neither attorney-client privilege nor the "so-called work product exception" preclude discovery of the contents of an insurer's claims file. *See Moskovitz*, 69 Ohio St. 3d at 661-63. Thus, because the claims file likely represents the sole source of documentary evidence going to the heart of Mr. Boone's insurance bad faith claim, the work-product exception provides no shield from his right of discovery to Vanliner's claims file.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The appellant requests that this Court grant jurisdiction and allow

this case so that the important issues presented in this case will be reviewed on the merits.

Respectfully submitted,

By: /s/ Richard Troxell
Richard H. H. Troxell,
Counsel of Record

COUNSEL FOR APPELLANT,
RICHARD BOONE

PROOF OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for appellee, Mark S. Maddox, Frost & Maddox, 400 South Fifth Street, Suite 301, Columbus, Ohio 43215-5430 on January 18, 2000.

/s/ Richard Troxell
Richard H. H. Troxell

COUNSEL FOR
APPELLANT,
RICHARD BOONE

IN THE SUPREME COURT OF OHIO

Richard Boone,	:	Case No. 00-104
Plaintiff-Appellant,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
vs.	:	
Vanliner Insurance Company, et al.,	:	Court of Appeals Case No. 98AP-1535
Defendant-Appellees.	:	

MEMORANDUM IN OPPOSITION OF JURISDICTION OF APPELLEE VANLINER INSURANCE COMPANY

(FILED FEB 17 2000)

Mark S. Maddox (0029852)
Frost & Maddox Co., L.P.A.
400 South Fifth Street #301
Columbus, OH 43215
(614) 224-0933
Counsel for Appellee,
Vanliner Insurance Company

Richard H. H. Troxell (0066395)
Wolske & Blue
580 South High Street #350
Columbus, OH 43215
(614) 228-6969
Counsel for Appellant, Richard Boone

TABLE OF CONTENTS

PAGE

EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST 1

STATEMENT OF THE CASE AND FACTS 3

ARGUMENT IN OPPOSITION OF APPELLANT'S PROPOSITION OF LAW 4

Proposition of Law: In an action by an insured for bad faith denial of insurance coverage or benefits, neither the attorney-client privilege nor the so-called work product exception precludes discovery of an insurer's claims file

CONCLUSION 8

PROOF OF SERVICE 9

EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

Ohio Civil Rule 26 provides the "ground rules" which Appellant claims are needed for the conduct of discovery in "bad faith" insurance cases. That Rule provides that "[p]arties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter" of the litigation. (Emphasis added). Ohio Courts have long applied this provision in many contexts, including "bad faith" insurance claims. Moreover, there is no indication of confusion among the bench or bar regarding the application of the attorney-client privilege to communications between an insurance company and its counsel. No cases from *any* other jurisdictions have been cited by Appellant as demonstrative of any confusion or other need for guidance from this Court on this issue.

Nor does Appellant's claim that this Court's intervention is necessary due to the recent enactment of R.C. 2505.02(B)(4) withstand careful scrutiny. Prior to 1994, discovery orders requiring the production of documents alleged to be privileged were final appealable orders. *Humphrey v. Riverside Methodist Hosp.* (1986) 22 Ohio St.3d 94, *overruled State ex rel. Steekman* (1994), 70 Ohio St.3d 420. There is no historical evidence or indication that the appeals courts were overburdened with such claims, and there is no reason to believe that will be the case now under R.C. Section 2505.02(B)(4).

The issue presented by Appellant, while based upon a unique, if distorted, understanding of the basis for the attorney-client privilege, is easily disposed of by applying long-standing principles of the common law. Appellant petitions this Court to hold that insurance carriers have no right to confidential communications with their attorneys *if* an insured makes an allegation of "bad faith". Not only does such a request stand the foundation for the attorney-client privilege on its head, but ignores the patent distinctions between a post-trial proceeding for prejudgment interest, and the pre-trial discovery of Appellees' work product and privileged communications. This distinction was well-noted by the Court of Appeals for Franklin County, and there is little reason to believe that other courts will be blind to the distinction such that guidance from this Court is necessary.

STATEMENT OF THE CASE

This is an underinsured motorist claim arising from a June 12, 1995 motor vehicle accident in Tampa, Florida.

As a result of injuries received in that accident, Appellant presented a claim to Appellee seeking underinsured motorists coverage. That claim was denied by Appelle [sic] on September 16, 1996. Appellant thereafter filed the instant "bad faith" claim, and sought production of Appellee's "claims file" as well as the file relating to a liability claim made against Appellant by another party to the accident.[1] Appellee objected to production of *some* of the documents requested on the basis that they were protected by the attorney-client and work product privilege.

The trial court sustained some of Appellee's objectives [sic] and overruled others. However, the trial court's decision was also internally inconsistent in that while it protected some documents from disclosure, it also ordered Appellee to produce some of those same documents when they were duplicated elsewhere in the files.

In the Court of Appeals, Appellee asserted that out of over 1,000 documents in the files, only portions of five (5) documents pre-dating the filing of this lawsuit were protected from disclosure by the attorney-client privilege.[2] Appellee also objected to the production of post filing notes in the file relating to Appellee's handling of the lawsuit. The Court of Appeals agreed that portions of 4 of

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[1] Appellant was determined to be 66% at fault for this accident and Appellee paid the other party, Robert Allison, $60,000 on Appellant's behalf.

[2] With one exception, these 5 documents were held privileged by the trial court when duplicated elsewhere in the file.

the 5 pre-filing documents were protected by the attorney-client privilege and that the remaining documents at issue were protected by the attorney-client or work product privilege.

The documents produced by Appellee clearly demonstrate the basis for Appellee's initial denial of the claim, and the employees of Appellee who made the decision to deny the claim are available for deposition. Appellants have never alleged, much less attempted to demonstrate, good cause for disregarding the word product privilege found to exist by the trial court and Court of Appeals.

ARGUMENT IN OPPOSITION OF APPELLANT'S PROPOSITION OF LAW

The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law." *Upjohn v. United States* (1981), 449 U.S. 383, 389. Its roots have been traced to sixteenth century English law. *Wigmore on Evidence,* Section 2290 (McNaughton rev. ed. 1961). Its purpose initially was to protect an attorney from being compelled to testify against a client, and thereby violate the attorney's honor as a "gentleman". *Id.*

"In the eighteenth century, when the desire for the truth overcame the wish to protect the honor of witnesses and several testimonial privileges disappeared, the attorney-client privilege was retained on the new theory that it was necessary to encourage clients to make the fullest disclosures to their attorneys, to enable the latter to properly advise their client. This is the basis for the privilege

today." *In re Colton*, 201 F. Supp. 13, 15 (S.D.N.Y. 1961), *affirmed* 306 F.2d 633 (2nd Cir. 1962). The Ohio legislature has codified the privilege concerning attorney-client communications in O.R.C. Section 2317.02(A). This Court has held that the privilege set forth in Section 2317.02(A) can be waived *only* as set forth in that statute. *State v. McDermott* (1995), 72 Ohio St.3d 570.

The attorney-client privilege is not without its costs. See generally, *Trammell v. United States* (1980), 445 U.S. 40, 50. Evidentiary privileges contravene the fundamental principle that "the public . . . has a right to every man's evidence." *United States v. Bryan* (1950), 339 U.S 323, 331. The effect of the privilege is to exclude relevant evidence from the fact-finder. *Fisher v. United States* (1976), 425 U.S 391, 403. Nevertheless, for over two hundred years courts have favored the protection of attorney-client communications over the disclosure of relevant evidence. See, *Hunt v. Blackburn* (1888), 128 U.S. 464, 470. "The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon a lawyer's being fully informed by the client." *Upjohn, supra*, 449 U.S. at 389.

Appellant's Proposition of Law, however, would deny the protection of the attorney-client privilege *retroactively* in every case in which an insured alleges his insurer acted in bad faith. In support of this proposed retroactive denial of privilege, Appellant cites the shopworn argument that application of the privilege in such circumstances "is limited" as it interferes with the "search for the truth". Appellant's arguments have long been rejected by this Court and the United States Supreme Court. To hold otherwise would effectively

eliminate an insurance carrier's desire to obtain timely legal advice due to the fear that any such legal consultation would become discoverable and its attorneys compelled to testify against it. If carried to its legal conclusion, the privilege would be eliminated in all cases involving litigation as it necessarily would interfere with the Court's search for the truth.

Moreover, Appellant's suggestion that this Court's holdings in *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St. 3d 638 and *Peyko v. Frederick* (1986), 75 Ohio St. 3d 169, should apply equally to "bad faith" insurance claims is illogical. Although Appellant claims that he is entitled to discovery of privileged attorney-client communications that do not go "directly to the theory of the case,[3] Appellant has not cited a single Ohio case permitted discovery of privileged materials in a case such as presented here. Instead, Appellant claims that the Ohio Supreme Court's decisions concerning post-judgment hearings should apply. Appellant ignores the significant difference between those cases and this matter.

The *Moskovitz* case cited by Appellees dealt with the issue or prejudgment interest under O.R.C. Section 12343.03(C). The issues presented in a *post-judgment* hearing under that statute differ markedly from those presented by the mere filing of a complaint alleging the bad faith denial of an insurance claim. The issue raised under O.R.C. Section 1343.03(C) is whether the losing party, in a

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[3] It should be noted that the privileged communications at issue here all directly relate to Appellee's theory of the case and would be protected even if the cases cited by Appellant were determined to apply.

case already adjudicated, reasonably evaluated its potential liability and made a good faith effort to settle the litigation. In such a circumstance, the Ohio Supreme Court had held that the "work product" privilege may be pierced as that information may constitute the only information directly related to the factual issue at hand. The Court also held that only those "communications . . . that go directly to the theory of defense" are protected in a 1343.03(C) proceeding.

The *Moskovitz* decision did not and could not, however, strip the work product and attorney-client privileges in cases dealing with the pre-trial *allegation* of bad faith denial of an insurance claim. In such a case, the issue is *not* how the insurance carrier evaluated the *litigation* (as there typically is none at that point), but rather whether it had reasonable grounds to deny the claim. *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552. Moreover, there obviously will be no communications as to the "theory of defense" since litigation typically has not been commenced prior to the denial of the claim. Finally, the risk of prejudice to the Appellee in a post-trial hearing is much less than that which would occur if the Court was to eliminate the work product and attorney-client privileges in pre-trial discovery proceedings. The unfairness and prejudice resulting from such a holding is manifest and would severely undermine the adversarial system of justice. Appellant could gain virtually complete access to the appellee's privileged communications and ongoing work product merely by alleging bad faith as a claim. Not only is such a proposition untenable, not one single decision from this or any other jurisdiction has

been cited by Appellant which permits such unfettered discovery in a case such as this.

At the trial court's level, Appellants cite the Montgomery County Court of Appeals decision in *Frank W. Schaeffer, Inc. v. C. Garfield Mitchell Agency, Inc.* (1992), 82 Ohio App.3d 322. That decision actually supports Appellee. In that case, the Court ruled that "a party may obtain *pre-trial* discovery of privileged materials only if such materials fall within some exception to the privilege or if the privilege will be waived at trial." 82 Ohio App.3d 329 (citations omitted) (emphasis added). To allow Appellant unfettered access to Appellee's privileged documents would certainly invade long-held notions of fairness and would restrict defense counsel's ability to properly prepare a defense. Such considerations are not present *after* a case has been tried and the defendant's strategy and tactics have been revealed in the course of the trial. This critical distinction explains the complete lack of authority permitting the pre-trial discovery of privileged communications.

Moreover, Appellant does not even attempt to establish the "good cause" necessary to violate the work product privilege. Although Appellant claims that "good cause" exists because he has brought a bad faith claim, he has failed to cite a single Ohio decision supporting this unique and untenable proposition. Moreover, Appellant's bald assertion that Appellee's work product "likely represents the sole source of documentary evidence going to the heart of Plaintiff's bad faith claim. . . . "is patently false and unsupported by the evidence. The Court's own review of the documents released and those cloaked by the work product privilege demonstrates the contrary. All

documents prepared by Appellee and leading to the denial of coverage have been released to Appellant *except* those containing privileged attorney-client communications. All work product documents at issue post-date the denial of coverage and the filing of this lawsuit and good cause for the discovery of those work product documents has not been demonstrated.

As indicated above, the documents relating to Appellees' decision to deny Appellant's claim on September 16, 1996, with four minor exceptions, have all been produced to Appellant. The four documents at issue have, in fact, been deemed privileged by the trial court when duplicated elsewhere in the file. The other documents at issue, created at least nine months after the September, 1996 denial and after Appellee's filed this lawsuit, are not discoverable as good cause has not been established as a matter of law.

CONCLUSION

The records at issue herein are protected by well-settled principles involving the application of the work product and attorney-client privileges. Appellant's unique and untenable Proposition of Law demonstrates the lack of general public interest.

Respectfully submitted,

FROST & MADDOX CO., L.P.A.
400 South Fifth Street #301
Columbus, OH 43215
(614) 224-0933

/s/ Mark S. Maddox
Mark S. Maddox (0029852)
Attorney for
Defendant-Appellant,
Vanliner Insurance Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was served by ordinary U.S. Mail, postage prepaid, on Richard H. H. Troxell, Attorney for Plaintiff-Appellee, 580 South High Street, Suite 3300, Columbus, OH 43215 this 17th day of February, 2000.

/s/ Mark S. Maddox
Mark S. Maddox